THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, SEPTEMBER 10, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance.

OBITER DICTA.—It is often difficult to separate matter of dicta from matter of judgment. Whoever has attempted to should construct head notes to adjudged cases, which in general embrace only the points in judgment, has frequently experienced this difficulty. In Starr v. Stark, decided by the U. S. Circuit Court for Oregon, in May last, Mr. Circuit Judge SAWYER asserts the proposition that where the record fairly presents two points upon the merits of the case, upon either of which the appellate court might rest its decision, and the court actually decides both, without indicating that it is intended to rest the judgment upon one rather than on the other, the decision upon neither can be regarded as *obiter*. The same principle was asserted by Mr. Justice NAPTON of the Supreme Court of Missouri, in Kane v. McCown, *ante*, p. 114.

BANKRUPT ACT—IMPORTANT RULING BY JUDGE LONGYEAR.—In the matter of William Buchanan, an alleged bankrupt, the petition was filed in the United States District Court for the Eastern District of Michigan, on the 4th of February, 1874. No one appeared in opposition to the said petition, and the matter was adjourned from time to time, and finally came up for hearing on the 3d instant, on motion of *John J. Speed* for an adjudication of bankruptcy, he maintaining that, under the ruling of District Judge HILL, of Mississippi, the petition need not be amended to conform to the provisions of the amendment made to the bankrupt law, approved June 22, 1874, unless objection is made by the alleged bankrupt. Judge LONGYEAR denied the motion on the ground that he did not consider the court authorized to adjudicate upon a petition for adjudication of bankruptcy filed since December 1, 1873, not made in conformity with said amendment.

COVERTURE AS AN EXCUSE FOR CRIME.—The Beecher investigating committee got slightly off the track when they enunciated the following as a proposition of law: "It is a principle of the common law that a married woman cannot commit or be held to commit a crime perpetrated in the presence of her husband, and this upon the idea that the husband's presence and influence amount to duress, and that she is, therefore, not responsible." The learned counsel of the committee, who no doubt inspired this sentence, must have quoted it from memory. If he had taken the trouble to open the first volume of Bishop's Criminal Law, 5th edition, §§ 362 *et seq.*, he would have found the following propositions enunciated and supported by the citation of numerous authorities: "Whenever the wife, being in the presence of her husband, is presumed to act under coercion, the presumption is only a *prima facie* one, which may be rebutted by evidence. * * * It follows that whatever the offence may be, the wife, like any other person, may be proceeded against jointly with her husband in the same indictment, and she can rely on the coercion only when the proofs are adduced at the trial."

LIABILITY OF EXPRESS COMPANIES—JUDGE BALLARD'S RECENT DECISION.—Whilst the question of the propriety of the rule laid down by Mr. District Judge BALLARD, in Bank of Kentucky v. Adams Ex. Co., published in our last issue, as to the liability of express companies for the loss of property in railroad accidents, where the common law liability is limited by stipulations in the receipt or bill of lading, continues fresh in the minds of our readers, the following remarks of the Albany Law Jouraal, having reference to shis particular case, will no doubt be read with interest:

In Christenso v. The American Express Company, 2 Am. Rep. 122 (15 Minn. 270), the liability of express companies in case of restriction in the receipt given by them was considered. The facts of this case were these: The defendants were an express company engaged in transmitting from place to place goods for hire, having at different points local agents whose duty it was to receive goods transmitted and deliver the same to the consignee, as well as to receive goods for transmission, having no vehicles or other means of transportation except at their local offices for local purposes, but transmitting goods in charge of their messengers, by steamboats, railroads, coaches, etc., owned and controlled by other parties. Plaintiff's agent delivered to them goods for transportation, taking a receipt, in which it was stipulated that the defendants were not to be liable for any loss or damage except as forwarders only. Nor for perils of navigation and transportation. The steamboat on which the goods were being transported, in consequence of the negligence of those in charge, ran upon a snag and was sunk, thereby injuring the goods. In an action to recover the damages, held that the defendants were common carriers, not forwarders, and as such were liable for the loss, notwithstanding the terms of the receipt which could not cover loss arising from negligence. The rule that express companies, who forward, goods from place to place for hire, in conveyances owned and managed by others, are common carriers and liable for negligence (even where the receipt restricts the liability) in themselves or in the agencies which they employ to transport goods and packages, seems to be supported by the following additional cases. Hooper v. Wells, Fargo & Co., 27 Cal. 11; Lowell Wire Fence Co. v. Sargent, 8 Allen, 189; Sherman v. Wells, 28 Barb. 403; Baldwin v. American Express Company, 23 Ill. 198; 26 id. 504; Read v. Spaulding, 5 Bosw. 395; Haslam v. Adams Express Co., 6 id. 235; Sweet v. Barney, 23 N. Y. 335; Verner v. Sweitzer, 32 Penn. St. 208; Southern Express Co. v. Newby, 36 Ga. 635. In Sweet v. Barney, *supra*, it was said that "it is conceded that the liability of a carrier begins with the receipt of the goods by him, and continues until the delivery of the goods by him, subject to the general exceptions. And an express carrier is bound to deliver goods at their destined place to the consignee, or as the consignee may direct." That a carrier cannot discharge himself from liability for the consequences of his own negligence, or that of his agents, is established by the following cases: Grace v. Adams. 1 Am. Rep. 131, and note; Ashmore v. Pennsylvania Steam Towing Co., 4 Dutch. 180; Davidson v. Graham, 2 Ohio St. 131; Camden & Amboy Railroad Co. v. Baldauf, 16 Penn. St. 77; Pennsylvania Railroad Co. v. McCloskey's Administrators, 23 id. 526.

From these cases the doctrine may be deduced that an express company, even in case of a restricted liability contained in the receipt which it gives for a package, is not exempt from liability where the loss occurs in consequence of the negligence of the railroad or steamboat company which it employs to transport the package, although the package may be in charge of the messenger of the express company traveling on the cars or the steamboat, and although the express company may have no control over the railroad or steamboat company.

FORMER ADJUDICATION—ESTOPPEL—TITLE TO REAL ESTATE.—Every practising lawyer knows the perplexing questions which arise in respect to when former decrees and judgments are a bar to another suit, and has, perhaps, often invoked or combated the doctrine asserted in La Guen v. Gouverneur, 1 Johns. Cases, 492, where it is said: "The principle, however, extends farther. It is not only final as to matter *actually determined*, but as to every other matter which the parties might *litigate in the cause, and which they might have had decided.*" And this general principle is repeated in similar language in many subsequent cases.

In the recent case of Starr v. Stark, in the Circuit Court of the United States for Oregon, Mr. Circuit Judge SAWYER examines this subject with his usual learning and ability, and reaches the conclusion that this general language must be restrained by a consideration of the facts of the cases in which it is used or adopted. The case just mentioned affords an interesting illustration of the tendency of courts in recent times to limit estoppels to cases where the exact point was in issue in the former suit, or failed to be litigated through the *negligence* of the party bringing the subsequent action. The facts were these: Starr, being in possession of certain lots in Portland, Oregon, filed a bill in chancery against Stark to determine an adverse claim of title by the latter, in which the complainant, as one ground of relief, alleged title derived to himself through a United States patent to the City of Portland, and that defendant claimed title adversely under a subsequent patent to himself. And, as another ground of relief, that the legal title was in defendant under his said subsequent patent; but, that through certain transactions set out, complainant had the equitble right, and was entitled to a conveyance of said legal title. The court, upon motion of defendant, held that the two grounds of action were inconsistent, and could not be litigated together in the same action, and required complainant to elect upon which he would proceed, and omit the other; whereupon, complainant, after excepting to the ruling and order, elected to rely on the first, and withdraw the second. A decree having been rendered in favor of complainant, on the cause of action retained, which was affirmed by the Supreme Court of Oregon, it was finally reversed by the Supreme Court of the United States, on the ground that the patent to the city was void, and the bill subsequently dismissed in pursuance of the mandate of that court. Complainant, then filed a second bill, alleging the equitable title before set up in the first, and withdrawn in obedience to said order of the court, and prayed a conveyance of the legal title. On these facts it was held, and as it seems to us properly, notwithstanding the dissent of the very learned district judge, that the proceedings and decree in the former action were not a bar to the second action.

Commenting on the case of La Guen v. Gouverneur, *supra*, SAWYER, J., says: "The principle is, that an end should be put to litigation; that parties should not litigate their rights by piece-meal; that they are bound to be diligent, and when called upon to litigate their claims they ought to present all they have to say, and that it is *negligence* to omit anything within their knowledge which might be available; and, if an omission is made, the consequences must fall upon the *negligent* party. *Negligence of the party himself is the main element of the principle upon which the rule is founded.*"

The Forum — Newspaper Credits.

We have received the following communication from the learned editor of the Forum:

In your notice of the Forum in your valuable journal, for August 20, I think you make a slight mistatement. The greatest object of the review is to publish the most recent cases of importance or interest *as soon as delivered*, and not take them from the latest published reports. With this view we have either the state reporter or some one resident at the state capital, to report them, and if you publish any of the same cases, especially from your state, it occurred from the fact that your journal being weekly and enterprising, gets the cases as soon as delivered, as we do. We will give you credit whenever we take anything from the "CENTRAL." For instance, we give the case of Lewis v. Balto. & Ohio R. R. Another law journal publishes it, and it reached us before our July number came out, but then we had the case reported long before it appeared at all in any place.

"We must also differ with you about arranging our cases by subjects instead of by states. If one desires to see what was decided in his state, without regard to subjects, he has them before him, if he is looking up a particular subject. The index in the back arranges them from all the states. In the way you propose, one in order to find out what his state decided, would have to look circumspectly over the entire abstract of 20 or 30 pages."

In our notice of the Forum, here referred to (*ante*, p. 421), we had reference to *abstracts* of decisions, and not to cases reported in full. We said: "We recognize many of these abstracts of decisions as being taken from current legal periodicals, where they are published in full. The editor of the Forum would greatly enhance the value of such by quoting the periodicals from which they are taken, since, in many instances, his readers will want to see the case in full. Besides, this would enable him to give the credit usual among journals in such cases." The above communication of the editor of the Forum renders it perhaps proper that we should particularize. On page 150 of the Forum, for July, is an abstract of the very able decision of the Supreme Court of Michigan in People *ex rel.* Sutherland v. Badgley. This abstract is the syllabus of the case written by Mr. Justice COOLEY and furnished this journal and published by us in our issue of June 18 (*ante*, p. 299). It is not unlikely that the Michigan State Reporter may have sent this case to the Forum, with the same syllabus. But the next abstract is that of the decision of Mr. District Judge WITHEY in Warren v. Ives, published in this journal for June 25 (*ante*, p. 312). This abstract is also the syllabus of the case, and was drawn by one of the editors of this journal. We recognize an abstract on the next page of the Forum, case of Viser v. Scruggs, as being the syllabus of the case as published by us in our issue for June 25 (*ante*, p. 313). This syllabus was furnished us, together with the case itself, by Mr. Justice SIMRALL of Mississippi. It is not unlikely that he may have furnished it also to the editor of the Forum. The next abstract in the Forum is that of Kellogg v. Milwaukee and Saint Paul Railroad Company. This case was reported especially for this journal, and the abstract in the Forum was written by one of the editors of this journal. The next abstract in the Forum (p. 153) is that of Taylor v. Steamboat Commonwealth. This is the syllabus of the case as published in full in the Chicago Legal News for July 11 (p. 334). It was written by the editor of that paper. Passing on to page 158 of the Forum, we find an abstract of Udderzook's case, decided by the Supreme Court of Pennsylvania. This is the syllabus of the case as published in our issue of July 16 (*ante*, p. 352). It was written by one of the editors of this journal. On the next page we find an abstract of People's Ins. Co. v. Kuhn, Supreme Court of Tennessee. This is the syllabus of the case as published in this journal for April 30 (*ante*, p. 214). It was prepared for us by Hon. J. O. PIERCE of Memphis.

These and other instances which we might give, will serve to show what was in our minds at the time we wrote the passage above quoted. We do not wish to be understood as assuming the attitude of sticklers for newspaper credits. We simply desired to throw out a friendly suggestion to the editor of the Forum, which he might turn to the advantage of his readers, and which might incidently be a benefit to us.

—THE common law may be called the severity of one remedial system; fiction is the cowardice of the law, and equity is the justice of the law.

Bankrupt Act—Discharge—Proportion of Assets to Debts.

Mr. District Judge BLATCHFORD, in *re* Franke, has recently decided the point that in bankruptcy proceedings, commenced prior to the 31st day of December, 1873, and subsequently to the 1st day of January, 1869, and where all the debts proved against the bankrupt's estate where contracted subsequently to the 31st day of December, 1868, and where application for discharge is not made until after the passage of the act of 1874, the right of the bankrupt to his discharge is subject to the (now repealed) acts of July 27, 1868, and act of July 14, 1870, and that his estate must pay fifty per centum of the debts proved against it, unless a majority of the creditors consent to his discharge. In other words, he holds that section 9 of the act of 1874 is not retroactive, and does not control the bankrupt's right to a discharge in cases which otherwise are subject to the restrictions of the act of 1868 and the act of 1870.

The facts of the case, as stated in Judge BLATCHFORD's opinion, are as follows: Charles J. Franke, Jr., and Charles F. Franke, were adjudged bankrupt, as co-partners by the court, on the 28th of June, 1872, on a petition filed against them. They appeared and filed a written consent to an adjudication. A warrant was issued, and the first meeting of creditors was held on the 2d of August, 1872. On that day thirty creditors proved their debts. An assignee was elected by the votes of twenty-seven of these. On the 19th of September, 1872, the bankrupts filed their sworn schedule of debts and assets. On the 23d of July, 1874, and not before, they filed a petition for discharge. By the 24th of July, 1874, forty-four creditors had proved their debts. The hearing of the petition for discharge was fixed for the 18th of August, 1874. No creditors appeared to oppose a discharge. The assignee has received moneys belonging to the estate to the amount of $9,996.22. It was not shown that the assets of the bankrupts were equal to fifty per cent. of the claims proved against their estate, upon which they were liable as principal debtors, nor was it shown that the assent in writting of a majority in number and value of their creditors, to whom they had become liable as principal debtors, and who had proved their claims, was filed at or before the time of the hearing of the application for the discharge. According to the schedule, all of the debts were contracted after the 31st of December, 1868. Notwithstanding these facts the register certified that the bankrupts had conformed to their duty under the act of Congress passed in 1867.

According to the act of 1868, no discharge could be granted to debtors whose assets were not equal to fifty per cent. of the claims proved against their estate upon which they were liable as the principal debtors, unless the assent in writing of a majority in number and value of their creditors, to whom they shall have become liable as principal debtors, and who shall have proved their claims, be filed at or before the time of hearing the application. By the first section of the act of July 14, 1870, it is declared that the provisions of the second clause of the thirty-third section of said act of 1867, as amended by the first section of the act of 1868 shall not apply to those debts from which a bankrupt seeks a discharge which were contracted prior to the 1st of January, 1869. "The requirements of the act of 1868," said the learned judge, "apply to all proceedings in bankruptcy commenced after the 1st of January, 1869, whether the petition be one filed by or against the debtor. Under these requirements the right to discharge in this case is not shown; but the certificate of the register implies that it is supposed that because this is a case of compulsory or involuntary bankruptcy, discharges may and must under the act of June 22, 1874, be granted without a compliance with the requirements of the act of 1868."

Judge BLATCHFORD has written a lengthy and elaborate opinion on these points, holding that the provisions of the act of 1868 must be complied with before a discharge in bankruptcy can be obtained, and the decision of the register in bankruptcy is overruled.

The Administration of the Law in the South.

The Washington Chronicle, a journal whose political bias certainly would not lead it to draw too strong a picture of this question, thus discusses the manner in which justice is administered in the courts of South Carolina:

From every indication it seems evident that not only in the administration of the affairs of the state, but in the execution of laws and the trial of causes in court, South Carolina is in an unusually unfortunate condition. Serious charges are openly made against the judges and officers of court, and it is said that it is impossible to obtain a just verdict from a jury, and if one is obtained the court fails to execute it. The juries are largly selected from the colored people. Many of them are honest, and desirous to do their duty conscientiously, but ignorant of the most ordinary rules of business, and without any knowledge of law whatever, or any experience in the business transactions of life. It is no uncommon thing, correspondents report, to find half the jury asleep, and in the courts the testimony and arguments are frequenly interrupted by the judge ordering the sheriff to wake up those jurymen. If the judge has not had his dinner, or if having it, it sits heavily upon his stomach and he feels gengenerally annoyed, he sometimes breaks out, after a short stock of patience is exhausted: "Mr. Sheriff, wake up them niggers!"

It is evident that where emancipated slaves are permitted to sit as jurors, a stringent jury law is needed, discriminating closely as to intelligence. We remember a case tried before the late Judge HUDSON, of the Criminal Court of Memphis, where a colored man maliciously pushed a white man off a fishing.boat, and drowned him. The body sank to rase no more, and was not afterwards recovered. This was seen by several witnesses; but a colored jury gravely acquitted the prisoner, on the ground that the *corpus delicti* had not been proven. Through the ignorance of jurors (and even of judges) in some of the Southern states, the administration of justice has become the grossest farce. The constant failure of justice has broken down the confidence of intelligent people in the judicial tribunals; mob law is hence invoked and encouraged, and the very ends of government are defeated.

There can be no excuse, however, for the failure to enfore the law in those states where the blacks are not predominant, and where the entire administration of the law is in the hands of the whites. We have had instances of mob violence in Missouri, which would be a reproach to savages, and the feeble and cowardly efforts of the authorities to punish them, have been humiliating in the last degree. We will let the Louisville Courier-Journal, which has no interest in misrepresenting its own state, tell how the law is enforced in Kentucky.

The law against the carrying of concealed weapons is a dead letter. Every coward and bully goes armed. Every case of manslaughter goes unpunished. Every case of shooting with intent to kill passes by as an amusing episode, provided there is no funeral. Even the most atrocious, cold-blooded, deliberate, malignant, dastardly assassinations have left no mark on the statute-books except the mark of acquitals purchased by money or intimidation. Red-handed murderers roam at large among respectable people. Red-handed

murderers occupy places of responsibility and trust. * * * There are at this moment fifty cases of homicide on our criminal docket, which ought to be recorded as murder cases, where the defendant is at large on bail, with the least possible danger of an adverse result. There are five hundred cases of petty shooting, with intent to kill, which will never come to trial. * * * In a word, there is no security for life, because no law for those who take it, in Kentucky, and has not been this many a year.

Any attempt to cure this state of things will be futile, unless the causes which have produced and which perpetuate it are first ascertained. These causes are two-fold: one for which the *people* are responsible, and the other for which the *courts* are responsible. So far as the responsibility of the people is concerned, it may be summed up in the simple statement that the popular difficulty in the way of preserving the peace and preventing crime consists in the fact that the law breakers are too numerous and too bold, and the law-abiding too few and too cowardly. So far as the responsibility of the courts is concerned, we may point to the fact that as early as 1822, the Court of Appeals of Kentucky, decided in Bliss v. Commonwealth, 2 Littell, 90, that a statute prohibiting the carrying of *concealed* weapons was unconstitutional; and although this rule has, within a comparatively recent period, been changed in Kentucky, under a different constitution (Hopkins v. Com., 3 Bush, 480; Cutsinger v. Com., 7 Bush, 362), yet it existed for more than a generation, during which time the popular habit of carrying weapons had become inveterate. Since the late war the same court has, in a series of decisions, enunciated the extraordinary and startling doctrine that a man whose life has been threatened by another may kill his adversary "on sight," whenever and wherever he may chance to meet him. Phillips v. The Commonwealth, 2 Duvall, 328; Carico v. The Commonwealth, 7 Bush, 124; Bohannon v. The Commonwealth, 8 Bush, 481. There may be extraordinary occasions and conditions of society where such a principle ought to be applied, but it is our deliberate judgment that society can have no peace wherever, as a general principal of law, such a rule is suffered to prevail.

Right of Recovery where Money is Paid on a Raised Check.

ESPY v. FIRST NATIONAL BANK OF CINCINNATI.

Supreme Court of the United States, No. 195, October Term, 1873.

Right of Bank to Recover Money Paid by Mistake on Raised Check—Effect of Bank Officer Pronouncing Such Check "Good."—A check drawn by S. and M. on the bank for $26.50, in favor of H., was raised to $3,920, and the payee's name changed to E. H. & Co., and offered to the latter by a stranger in payment for bonds and gold purchased by him. E. H. & Co. sent the check for information to the bank; whose teller replied "it is good," or "it is all right." In a suit brought by the bank against E. H. & Co. a judgment was given for plaintiff. On error to this court it was held:

1. That where money is paid on a raised check by mistake, neither party being in fault, the general rule is that it may be recovered back as paid without consideration.

2. But that, if either party has been guilty of negligence or carelessness by which the other has been injured, the negligent party must bear the loss.

3. That where a party to whom such a check is offered sends it to the bank on which it is drawn, for information, the law presumes that the bank has knowledge of the drawer's signature and of the state of his account, and it is responsible for what may be replied on these points.

4. That unless there is something in the terms in which information is asked that points the attention of the bank officer beyond these two matters, his response that the check is good will be limited to them, and will not extend to the genuineness of the filling-in of the check as to payee or amount.

5. *Quære:* Would the endorsement of the word "good," with the officer's initials, under such circumstances, make the bank liable beyond the genuineness of the signature and the possession of funds to meet the check as certified?

6. Where a check is certified for the purpose (known to the bank) of giving it credit for negotiation or circulation, to be used as money, and it so passed into the hands of third persons, the bank would be bound, though the case might be otherwise when it was only certified to give the party presenting it assurance that it was good for his own satisfaction in taking it.

7. But it is clear that a verbal reply that a check is good, given for the information of the party about to receive it, extends only to matters of which the bank had knowledge, or is presumed to have by the law, unless he is told that more extended information is expected or asked for as to the validity of the check.

In error to the Circuit Court of the United States for the Southern District of Ohio.

Mr. Justice MILLER delivered the opinion of the court.

Stall & Meyer, customers and depositors with the First National Bank of Cincinnati, made their check on that bank for the sum of $26.50, payable to the order of Mrs. E. Hart, and delivered it to a stranger to all the parties to the transaction out of which this controversy arose. This man erased the name of the payee and the amount for which it was given and inserted the name of Espy, Heidelbach & Co., bankers and brokers, and also the sum sum of $3,920, and passed it to Espy, Heidelbach & Co., in payment of bonds and gold which he purchased from them.

The check was paid by the bank through the clearing-house, and the next day the fraud was discovered and the bank made a demand on Espy, Heidelbach & Co. for the amount, as paid through a mistake.

If this were all the case there would be no doubt of their right to recover. The principle that money so paid under a mistake of the facts of the case can be recovered back is well settled; and in the case of raised or altered checks so paid by banks on which they were drawn, there are numerous well considered cases where the right to recover has been established, when neither the party receiving nor the party paying has been in any fault or blame in the matter. Of course if there is fault on the part of the party receiving pay for such a check, it strengthens the right of recovery.

But in the case before us the rights of the parties are to be determined by what took place between themselves before the check was paid. It appears by the bill of exceptions that the man who perpetrated the fraud, having ascertained from Espy, Heidelbach & Co. the price of the bonds and gold which he proposed to buy of them, told them that he had dealings with Stall & Meyer and would get their check for the amount, and after an absence of two or three hours returned the check in question. Not wishing to take it from this stranger without further information, they sent Mr. Snarenberger, one of their clerks, to the bank, with instructions to ascertain if the check was good, and to say that it was presented by a stranger. Snarenberger presented it to Mr. Sanford, the proper officer of the bank, who, after examining the check and the state of Stall & Meyer's account, said "it is good," or "it is all right." "Send it through the clearing-house."

There is a slight disagreement between Snarenberger and Sanford as to the precise words used, but we do not deem the difference of any importance. But there is difference in another point between these two, which with the jury might have had some weight. Snarenberger testifies that he told Sanford that the check was offered to his house by a stranger, which Sanford denies; and Sanford says that he told Snarenberger that if the check was offered by a stranger, he would advise them to have nothing to do with him; that he would be careful and not pay so large at check to a stranger, no matter how good looking he was.

On the return of Snarenberger, Epsy, Heidelbach & Co. delivered the bonds and gold to the stranger and received the check in payment, and in the language of the record, the stranger went his way and was heard of no more. Espy, Heidelbach & Co. endorsed the check, and it was paid as stated already, through the clearing-house.

In the suit brought by the bank to recover the money it had a judgment, to reverse which this suit is brought.

The defendants excepted to the admission of certain testimony given by the plaintiffs on the trial for the purpose of proving that the words "all right," "it is good," when used in reference to a

check presented at the bank on which it is drawn, had, by the custom and usages of the bankers of Cincinnati, acquired a limited and well understood meaning, namely, that it had reference exclusively to the genuineness of the drawer's signature and to the state of his account at the bank. The objections made to this evidence were that in its nature it was inadmissible; that the person testifying showed his want of knowledge on the subject, and that the expressions "all right" and "it is good" were not the precise expressions used. But we need not enquire whether the court was right in admitting this testimony, because in the subsequent progress of the trial it became immaterial. The court refused to charge the jury, as requested by the plaintiffs in their fifth and sixth prayers, that if there was such an understanding among bankers as to the use of the terms mentioned, it limited the responsibility of the bank to these two matters; and in the charge of the court of its own motion, it placed the case beyound the influence of such testimony, by instructing the jury that as matter of law such was the effect of the words supposed, when used under the circumstances suggested by the interrogations of plaintiff's counsel in regard to the understanding of them among bankers.

We are relieved also, by an attentive consideration of the instructions given by the court, from another very grave question much discussed by counsel in this court, that is, whether a verbal statement, by the proper officer to certify checks, that the one presented is good, is, or is not, the equivalent of a written certification of the check in the usual manner. For the fourth instruction asked by the defendants and granted by the court is precisely what is claimed by counsel here as to the effect of such verbal statement, as will be seen at once by its inspection. It is as follows: "A verbal certification of a check is equally valid with a written certification, and constitutes a contract obligatory on the party giving the certification, the consideration of which is the property parted with by the party receiving the certification on the faith of the certification." The plaintiff in error, against whom the jury rendered their verdict, notwithstanding the instruction thus given, must be held to have had the benefit of the principle thus asserted with the jury, whether the court was right in giving it or not.

The plaintiffs on the trial below prayed ten distinct instructions to the jury, all of which were granted except the fifth and sixth, which we have considered. The defendants prayed eight instructions, all of which were refused or modified except the fourth, to which attention has just been called. Upon all these rulings of the court as well as upon the charge of the court of its own motion, errors are assigned.

But we are of opinion that the whole case turns upon the latter charge of the court. This consisted of four distinct propositions:

1. That if defendants below sent the check to the bank for the purpose of having the latter pass upon the genuineness of the signature and the state of the account of the drawer, the statement that it was good, or all right, would estop them from denying that the signature was genuine, and there were funds to meet it.

2. If defendants sent the check for the purpose of testing the genuineness of the signature of the drawers, the state of their account, and to test its genuineness in all other respects, and plaintiff knowing the full extent of the object for which it was sent, replied "it is good," or "it is all right," plaintiff is estopped to set up that the check was raised.

3. That if the defendants had no suspicion that the check was raised, and sent it to plaintiffs for examination without specifying the particulars to which they wished the examination directed, the plaintiffs had a right to presume that it was desired in relation to such points as the law presumed them to have knowledge, namely: the genuineness of the drawer's signature and the state of his account, and if they answered in good faith and had no means other than those of defendants of knowing that the check was raised, they were not estopped from setting up that fact.

4. That if the parties were mutually ignorant and unsuspicious concerning the check being raised, the law did not impose upon plaintiffs more than the defendants, the duty of calling on the drawers for information on that subject.

The plaintiffs in error, defendants below, can have no cause to complain of the first and second proposition laid down by the court below.

If the bank officers had their attention turned to the matter of the raising of the check, or even had notice that, in applying to them for information, the parties presenting it did so for the purpose of getting information which would include that subject, they could have limited their general statement that it was good so as to exclude its application to that point, or might have declined answering altogether. If, with this notice, says the court, they gave a general statement that the check was good, or all right, these words must be held to have reference to all the matters on which they knew the other party asked or desired their opinion. Unless we are prepared to hold, to the fullest extent, the principle asserted by the plaintiffs in error, that the general statement that the check is good binds the party making it as to everything connected with its validity; this charge of the court is as favorable to them as it should have been, and is only doubtful as it militates against the bank.

We think it is equally clear on principle that there was no error in the fourth proposition of the court. Undoubtedly, where there exists a suspicion that the check has been altered in the amount, or in the name of the payee, the proper party to be enquired of is the maker of the check. He and he alone has the means of settling that question conclusively. The bank, as a general rule, can know this no better than the party to whom it is presented for negotiation. It is the latter who first parts with his money or property on the faith of the check, and he is as much bound to diligent enquiry on that question as the bank. The latter is held by law to know the drawer's signature and the state of his account. He is no more bound to know or to answer beyond these two matters than the party who presents it for information. So if there be no suspicion of the fraud in raising the check, the parties are equally innocent, and no question of the relative degree of diligence in making enquiry on that subject arises between them. This is certainly true unless the bank, if it consents to give any information at all about the validity of the check, is bound to answer as to everything which may affect its validity. As this contention is the turning point of the case and is the one which is responded to in the third of the propositions laid down by the court, we turn now to consider that.

This assumes that neither party had any suspicion that the check was raised, and that no special reference was made to that point in the enquiry of the defendants below. It is also to be considered that the bank was not asked to certify it in the usual way by endorsing it as good, and that the party who asked information was the one whose name was in the check as payee. We do not propose to decide here what would have been the legal effect in the present case if the bank officer had, under precisely these circumstances, been requested to endorse the check as good and had done so, affixing his name or his initials in the ordinary way.

The strong argument of plaintiff in error is that such an endorsement would bind the bank for the entire validity of the check, and that what was said verbally by Sandford was the legal equivalent of such an endorsement. If this latter point were conceded, no case precisely in point has been produced where this would be held to bind the bank under the circumstances of the present case. The authorities relied on are mainly acceptances of drafts or bills of exchange, and it is the same class of cases that are relied on to show that a verbal acceptance, or promise to accept, is equivalent to a written acceptance. The highest courts in this country and in England have regretted the decision which gave original sanction to this latter proposition.—Boyce v. Edwards, 4 Peters, 122; Johnson v. Collins, 1 East. 103.

Bank checks are not bills of exchange, and though the rules applicable to each are in many respects the same, they differ in important particulars. Merchants' Bank v. State Bank, 10 Wallace, 647. Among these particulars is that a check is drawn against funds on deposit with the banker, and the endorsement that it is good implies that when the endorsement is made there were funds there to pay it. A bill of exchange is not drawn on such deposits necessarily, and its acceptance raises no implication that the drawer has such funds to meet it. It is a new promise by the acceptor to pay, funds or no funds. In both cases the bank is supposed to know the signature of its correspondent, and cannot, after endorsing it as good or accepted, dispute the signature. But as one of the main elements of utility in a bill of exchange is that it shall circulate freely, and it may thus pass through many hands on the faith of the acceptor's signature, it may possibly be that he should be responsible for the promise contained in it, as it came from his hands, for it was drawn on no special fund, and the possession of such fund by him does not affect his liability. By such acceptance he becomes primarily liable, as if he were the maker of a promissory note. How far these reasons should be applied to a certification that a check was good, seems extremely doubtful, both on principle and authority. Where the object is to use the endorsement to put the check in circulation, or raise money on it, or use it as money, and this object is known to the certifying bank, it may be argued with some force that the bank should, as in the case of an acceptance of a bill of exchange, be held responsible for the validity of the check as it came from the hands of the certifying bank. Such a rule would seem to be just when the checks are certified, as we know they often are, without reference to the presence of funds by the drawer, and when the well-known purpose is to give the drawer a credit by enabling him to use the check as money by putting it in circulation.

But such a verbal statement as was made in the present case cannot come within that principle. There was no design or intent on the part of the bank to assume a responsibility beyond the funds of the drawer in their hands, nor to enable the payee of the check to put it into circulation. Nothing was said or done by the bank officer which could be transferred with the check as part of it to an innocent taker of it from the payee. Such subsequent taker would have no right to rely on what was said by the bank officers, any further than the payee would.

We are of opinion that the court was entirely right in treating the case as one in which information was sought and obtained by Epsy, Heidelbach & Co., for their own use, and to govern their own action. For such information as the bank was willing to give, and did give, it was, no doubt, responsible, because it had reason to believe that the other party would act upon it. But only to this extent and only on this principle is it liable. It is not liable as for accepting or endorsing a draft or check with intent that it might go upon the market for general use and negotiation with the credit of its name attached to the paper just as it was placed on the market.

Under these circumstances we are of opinion that the circuit court was right in holding that in the absence of anything tending to direct his attention to other matters, the bank officer had a right to suppose that the information was desired of him only in regard to the signature of the drawers and the state of their account. These were material facts to be known, which both common sense and commercial law presumed to be within his knowledge. The answer he gave that the check was good, or was all right, must be supposed to be responsive only to these two points. The genuineness of the payee's name, and of the sum filled in the body of the check, were as well-known and as easily ascertainable by the payees themselves as by the bank officer, and unless the enquiry was so framed as to call his attention to these points, he had no reason to suppose, in the nature of the transaction, that he was expected to give information in regard to them. So the response of "good" should not on sound principle be held to extend to them. He was under no moral or legal obligation to give an opinion on these points. He had no reason to suppose that he was asked for such an opinion, and because he did give an opinion that the check was good in the only points of which he knew anything, it would be illogical to hold the bank liable on the ground that the response meant good absolutely and for all purposes.

The court told the jury very clearly that if the bank officer had any reason to believe that the defendants were seeking information in regard to the general validity of the check, or if they had been asked any question which related to the genuineness of the check as to amount or the names of the payees, his statement that it was all right would bind the bank. This was as far as the court ought to have gone in that direction, for they were not bound to answer such a question, nor, as we have already said, does the law or the nature of the business imply that they had any superior information on these points to that which the defendants had.

The case was certainly very fairly put before the jury, so far as the rights of plaintiffs in error are concerned, if the views here advanced are sound, and the judgment must be

AFFIRMED.

Remedy by Assignee in Bankruptcy Against Stockholders of Insolvent Corporations for Unpaid Stock.

NATHANIEL MYERS, ASSIGNEE OF ST. LOUIS SOAP COMPANY, v. F. A. SEELEY *et al.*

United States District Court, Eastern District of Missouri.

Before Hon. SAMUEL TREAT, District Judge.

1. **Rights of Creditors against Stockholders.**—The remedy in equity of judgment-creditors of insolvent corporations against the stockholders who have not paid in full for their stock, stated and discussed.

2. **Bill in Equity by Assignee of Bankrupt Corporation Against Stockholders.**—The assignee in bankruptcy of an insolvent corporation cannot maintain a bill in equity in the District Court against the stockholders of such corporation to collect assessments upon their unpaid stock; because such a bill would necessarily require the appointment of a receiver who could not be the plaintiff in the suit, and would hence supersede the regular bankruptcy proceedings. The proper course is for the district judge to order an assessment upon all unpaid stock to be collected by the assignee.

Bill in equity by the assignee of a bankrupt corporation against the stockholders to collect the amount alleged to be due on their respective shares of stock.

Meyers & Litton, for plaintiff; *S. M. Breckenridge, Ira C. Terry, Lee & Adams*, for defendants.

TREAT J.—The bill is by the assignee of a bankrupt corporation, against certain stockholders, to compel payment by them of the amount alleged to be due on their respective shares of stock. Many of the parties defendant have not been served, and many responsible stockholders are not made defendants.

Bills by creditors who have judgments against a corporation have been sustained against the corporation and its stockholders. Said bills being framed in the name of the judgment-creditors and of all others who may choose to come in and be made parties thereto. In such cases the decree has been for an account to be taken of the debts and assets of the corporation, for the appointment of a receiver, to whom the stockholders and officers are ordered to pay and account respectively for so much of the assets and capital stock as are necessary to pay the debts due to the creditors; the assets thus collected and received to be applied by the receiver in discharge of the debts.

The reason of that rule is, that the unpaid subscriptions are assets applicable to the payment of corporate debts which the corporate authorities may call in for corporate purposes. If there are adequate assets other than said calls, then the creditor has no legal or equitable right to insist upon such calls. Primarily, the amount due on subscriptions is a debt to the corporation which it alone can enforce. and unless the corporation is without other assets to meet

its obligations, and fails to make the needed calls, creditors cannot interpose. When the facts justify their interposition, an account of assets and debts should be taken in order that it may be known what, if any, calls should be made. No further call should be made than what is sufficient, together with the other assets to meet all debts; for the bill by creditors cannot reach beyond the satisfaction of their demands. They have no other equity. Adler v. The Milwaukee Patent Brick Manufacturing Co., 13 Wis. 57.

If a company is insolvent, the original mode of making calls upon the stock is not to be pursued in the enforcement of such a decree; for the debt is then due on the stock without demand, and no stockholder can shelter himself behind an agreement that he might pay otherwise than in money, or money value, as other stockholders have to do.

Every share of stock subscribed represents an asset available to the corporation and its creditors. The payment of it in full, that is, actual cash payment, or payment of cash value, is enforceable. As between the corporation and its stockholders, its agreement as to paid up stock may be valid, but neither directors nor stockholders, nor both, can so act towards creditors as to debar the latter from insisting upon the actual payment by stockholders of what is really due on their stock.

The assignee of shares can be in no better condition than the assignor. The transfer is not, so far as the right to make calls is concerned, dependant upon the good faith of assignor and assignee in their dealings between themselves.

The question is simply whether the stock has been really paid in full to the corporation. The assignee may have paid for it to the assignors, and may have relied on the representations of the latter, and of officers of the company, that the shares bought were fully paid; yet creditors are not bound thereby, and if the stock was not fully paid, the holder is liable to creditors for the amount remaining unpaid.

The foregoing rules are clear enough for all ordinary cases brought by creditors; yet here as stated in the case cited from 13 Wis., and in the case of Ogilvie v. Knox Ins. Co., 22 How. 380—where the corporation is in bankruptcy, what is the proper course to be pursued? The assignee in bankruptcy has all the authority of a receiver to collect demands and pay debts; the proceedings in bankruptcy are adjusting the accounts, and the court sitting in the bankrupt case is proceeding to ascertain what calls, if any, will be necessary. If this suit in equity (and it might have been brought in the United States Circuit Court) is to result in a decree for an account, etc., shall the decree take from the court sitting in bankruptcy all further cognizance of those matters, or in other words, shall the Court of Equity draw into its jurisdiction and supersede all the powers and functions of the court in bankruptcy, specially charged by law with the collection and distribution of the assets of this insolvent corporation?

This suit is by the assignee in bankruptcy, and under the orders of the court appointing him, an assessment may be made on the unpaid shares, just as if the same had been ordered by the corporation before bankruptcy, for he represents the corporation for the collection of all its assets. He represents also the creditors who are not bound by any agreement between the corporation and its stockholders, whereby the latter were to be considered as holding full paid stock. Hence, to now order an account to be taken by a master and to appoint a receiver, etc., would be virtually to supersede the pending proceedings in bankruptcy.

The proper course seems to be to dismiss the bill without prejudice, and order an assessment on all unpaid stock to be collected by the assignee; otherwise the proceedings will be embarrassed at every stage.

As the assignee is plaintiff, the court cannot appoint him receiver; and if he is to be superseded in the administration, what is to become of his powers and duties, and also of the ordinary and regular proceedings in bankruptcy? The powers and duties devolved by the bankrupt act seem necessarily to make a distinct proceeding in equity improper—to supersede that mode of satisfying creditors' demands against an insolvent corporation which has been adjudged bankrupt.

NOTE.—To avoid any difficulty arising from the two years' limitation clause in the bankrupt law, which might prevent the bringing by the assignee of new suits against the individual stockholders, to recover payment of the unpaid stock on their respective shares, the court, instead of formally dismissing the bill, as indicated in the opinion, subsequently directed "that the bill be retained for further proceedings thereunder on the following order: That the assignee proceed to collect from all stockholders of said company the amount due and unpaid on their respective shares." As to the general right of creditors and of the assignee in bankruptcy against the delinquent stockholders of a bankrupt corporation, see Sawyer v. Hoag, *ante*, p. 43.

Taking Private Property for Railroads.

CALIFORNIA PACIFIC RAILROAD COMPANY v. ARMSTRONG.

Supreme Court of California, April Term, 1874.

Hon. WILLIAM T. WALLACE, Chief Justice.
" JOSEPH CROCKETT, } Associate
" ADDISON C. NILES, } Justices.
" AUGUSTUS L. RHODES, }
" ISAAC S. BELCHER, }

1. **Eminent Domain—Taking Property for Railroads—Damages where the Track is Laid before Condemnation.**—Although a railroad company enters upon land and lays its track thereon before having it condemned in the proper proceeding, yet, upon proceedings afterwards instituted to condemn the land, the owner will not, under the California statute, be entitled to have the track so laid considered as a part of his realty, and its value considered in estimating the "just compensation" he is to receive. In this case the railroad company entered upon the land, pending a former proceeding, to condemn the same, which was dismissed.

2. ——. ——. **"Special Benefits."**—The "special benefits" mentioned in the California statute, are not confined simply to those benefits which are special to the particular tract of land taken, but include benefits which the track receives from the construction of the road, in common with other contiguous lands which are not taken for railroad purposes.

Opinion by CROCKETT J., WALLACE, Ch. J., BELCHER and NILES, JJ., concurring. RHODES, J., in a qualified concurrence.

This is a proceeding to condemn land for railroad purposes; and it appears in the case that, in the year 1868, the plaintiffs commenced a similar proceeding for the purpose of condemning the particular tract in contest here, and other lands; and obtained an order of court allowing them to enter upon and retain the possession of said tract pending the proceedings, and duly filed a bond as required by the statute in such cases. It further appears that, before the hearing in the present proceeding, the former proceeding was dismissed as to this tract; and that "before the commencement of this proceeding" the plaintiffs had constructed upon the land a railroad track, at their own expense, of the value of $2,211 24 without the consent of the then owner of the land, from whom the present defendant purchased. It is not expressly stated that the track was built whilst the order made in the proceeding of 1868, authorizing the plaintiffs to enter upon and retain the possession, was in force; but we infer that such was the fact. Nor does it appear on what ground, or for what reason, the former proceeding was dismissed. The commissioners in the present case assessed the value of the land, at the commencement of the action, at the sum of $403 50, exclusive of the railroad track; which they estimate to be to value of $2,211 24. This being a portion of the larger tract, they estimate the damages to that portion not taken at $1,112 50, and the benefits which accrued to the part not taken, "by the enhancement of the value thereof in consequence of the construction of the railroad (there being no special benefits), at the sum of $1,112 50." The court below held that the value of the railroad track, constructed by the plaintiffs, ought not to be estimated as a part of the land taken, and excluded it from the computation; and also held that the benefits to the land not taken should be set off against the dam-

ages thereto. These rulings constitute the grounds of error relied upon on this appeal.

The argument on behalf of the defendant on the first point is, that the plaintiffs, in constructing the railroad track, were trespassers, and that the track, being attached to the soil, became a part of the realty, and belonged to the owner of the land. Hence, he claims that its value ought to be included in the estimate of damages, in like manner as though the defendent had himself built the road. But this proposition cannot be maintained. Neither the constitution nor the statute contemplates that a person, whose land is taken in the exercise of the right of eminent domain, shall be entitled to anything beyond a "just compensation." He is to be paid the damage he actually suffers and nothing more. But to hold that, in addition to the fair value of the land taken, and such other damage as he may suffer by severing it from the remainder of his tract, he shall also recover the value of a railroad track in the construction of which he never expended a dollar, and which was built by the plaintiffs at their own expense, would be to defeat the obvious intent of the statute by an over-technical construction of it.

On the second point, the proposition is that it appears from the report of the commissioners that there were no *special* benefits to the lands not taken, resulting from the construction of the railroad; though they also find that it will thereby be enhanced in value in the sum of $1,112 50. From this the defendant's counsel deduce the argument that, inasmuch as this land will only be benefited in common with other contigous lands, and will receive no benefit peculiar to itself, it does not come within the rule which requires benefits to be set off against damages. In other words they insist, that the benefits must be *special* and peculiar to the particular tract—something different from, and in excess, of the benefits resulting to other adjoining lands. But there is no valid reasons for this distinction. The theory of the statute is that the land-owner shall receive a fair, just compensation for the damage he suffers; and if that portion of his tract which is not taken will be enhanced in value by the construction of the railroad, his damages will be diminished to the extent of the enhancement; and hence the statute contemplates that by deducting this benefit from the damages, the sum which remains will constitute a "just compensation" in the sense of the constitution. This was the view of the question announced in the case of The San Francisco, Alameda and Stockton Railroad Company v. Caldwell, 31 Cal., 367, which is decisive of the point.

JUDGMENT AFFIRMED.

I dissent from the conclusion announced on the first proposition.

RHODES, J.

NOTE.—We published some time since (*ante*, p. 124), a note of a case, United States v. A Tract of Land, etc., where the government had forcibly taken possession of a tract of land for light-house purposes, and, after having built a light-house thereon, instituted proceedings to condemn it. The same court held that the light-house became annexed to the soil, belonged to the owner, and that its value was to be estimated in fixing the damages. This is no doubt good common law, but there is no sense in it. It is a lingering barbarism which ought to be repealed. Justice and sense in such a case would have been satisfied with giving the owner the actual value of the land, exclusive of the light-house, and also the damages he had actually suffered by reason of the trespass.

We publish the foregoing case at the request of several subscribers.

Lease—Assignment by Lessor as Secu ity—Rights of Such Assignee Agains: the Assignee in Bankruptcy.

DANIEL F. MEADOR *et al.* v. R. D. EVERETT, ASSIGNEE IN BANKRUPTCY OF L. H. CLARK.

United States Circuit Court, Western District of Missouri, August, 1874.

Before DILLON, Circuit Judge.

The assignment, transfer and delivery of a lease by the lessor to secure a debt, is valid as against the assignee in bankruptcy of the lessor.

In the bankruptcy proceedings against L. H. Clark in the District Court, the petitioners, Daniel F. Meador and his copartners, filed a petition in the nature of a bill in equity for the enforcement of a lien, to which the district court sustained a demurrer and dismissed petition.

The petitioners, Meador & Co., appeal from this action of the district court.

Their petition as filed in the district court, in substance states that, in July, 1870, the complainants sold to L. H. Clark, one of the bankrupts, certain furniture to be used in his hotel at Kansas City, for the sum of $6,731.90, for which said Clark executed six notes for $1,000 each, payable in 2, 3, 4, 5, 6, and 7 months from date, and one note for $731.90, payable eight months from date; that the same having been proved against the estate of said Clark, that on the 1st of May, 1870, Clark executed a lease of said hotel to one John C. Parks for five years; that Parks took possession of the property under the lease July 1, 1870; that the lease was duly recorded July 8, 1870; that on the 7th of July, 1870, said Clark, to secure the payment of said notes, assigned, transferred and delivered possession of said lease to complainants with the consent of said Parks; that on the 6th of July, 1870, said Clark gave complainants a power of attorney to receive and collect the rents accruing to said Clark under the lease, until their debt should be paid, and thereby authorized and empowered them to do and perform all in reference to said lease that said Clark himself could do; that on the 6th of July, 1870, as a further security, and a further recognition of the assignment of said lease from said Parks, said Clark drew his bill of exchange for $6,731.90 on said Parks, who accepted the same, thereby becoming liable for said debt, and agreeing to apply the rent of said building to its payment, as the same became due; that said Everett, as assignee, now has possession of said hotel; and that by reason of the premises complainants have a lien upon the rents of said hotel and pray that the assignee be required to rent said hotel for ——months, the proceeds to be applied to the payment of their debt, and for general relief.

W. B. Napton, Jr., for the petitioners (appellants); *Lay & Belch*, for the assignee in bankruptcy.

DILLON, Circuit Judge.—The bankrupt, owning a hotel, made a lease of it for five years to one Parks, reserving rent. Being indebted to the petitioners, the bankrupt, to secure them, it is alleged, "assigned, transferred and delivered possession of said lease to the petitioners, with the consent and sanction of said Parks, the lessee." At the same time it is further alleged, that "the bankrupt executed to the plaintiffs a power of attorney to receive and collect the rents accruing under the said lease, and to do and perform all acts with reference to said lease that the said lessor himself could do." And it is further alleged that the lessee accepted the lessor's bill in the plaintiffs' favor for the amount of their debt against the lessor, said bill to be paid out of the rents as they fall due. No copy of the lease or assignment, or power of attorney is in the record, but according to the averrments it must be taken that the assignment was in writing. In the absence of the written assignment and instrument I can do no more than to indicate the legal rights of the parties upon the facts set forth in the plaintiff's petition.

If the transaction between the bankrupt and the plaintiffs gave to the latter any rights or equities in respect to the rents or the demised property, the assignee in bankruptcy takes the estate subject thereto. In this respect he stands precisely in the place of the bankrupt. Assuming the allegations of the petition to be true, they show in the plaintiffs, as against the bankrupt, such rights in respect to the rents or demised property as the law will recognize and protect. It is well settled that it is competent for the lessor to separate, by contract or devise, the rent from the reversion, retaining one and disposing of the other, or disposing of the rent to one person and the reversion to another. 1 Washb. Real Prop. 338, where many cases are collected.

Whatever the contract between the bankrupt and the plaintiffs

show the former disposed of to the latter, will be binding upon the former and his assignee in bankruptcy. In Russel v. Russel, 1 Brown Ch. R. 269, it was decided that the pledge of a lease by the lessor, by delivery merely, was in equity a mortgage of the leasehold estate as against the assignee in bankruptcy. Much more clearly would this be the case where there was an express assignment and delivery of the lease by the lessor to secure a debt. In ex parte Wells, 1 Vesey, 162, Lord Chancellor THURLOW said, "an assignment of rents and profits is an odd way of conveying, but it amounts to an equitable lien, and would entitle the assignee to come into equity and insist upon a mortgage."

The petition states a case which *prima facie* as to the demised estate puts the plaintiffs, so far as neccessary to secure payment of their debt against the bankrupt, in the place of the bankrupt, and therefore the demurrer of the assignee ought to have been disallowed.

The extent of the plaintiffs' rights I can not determine in the absence of the lease, the assignment and power of attorney. I only hold that the petition makes a case giving, to some extent at least, a lien which the bankruptcy court should respect. I see no reason why the rights of the plaintiffs and assignee may not be well determined upon the petition of the plaintiffs.

The order sustaining the demurrer and dismissing the petition is reversed, and the district court directed to permit the assignee to answer the petition if he shall be so advised.

ORDERED ACCORDINGLY.

Municipal Corporations—Power to Tax.

A. L. SLACK, ADMINISTRATOR, v. JAMES S. RAY, ASSESSOR AND COLLECTOR.

Supreme Court of Louisiana, July 25, 1874.

Power to Tax Construed.—The grant to a municipal corporation of the full power to tax, gives, by implication, authority to use all necessary means to effectuate the object, including the imposition of appropriate penalties, such as is used by the state in collecting other taxes.

Appeal from Parish Court, Parish of Ouachita.

A. L. Slack, for plaintiff; *W. W. Farmer*, for defendant.

The opinion of the court was delivered by WYLY, J.—The plaintiffs enjoined the tax-collector from selling certain property, belonging to the succession represented by him, for taxes due the city of Monroe for the year 1873, and also for the penalties for non-payment of said taxes. The court dissolved the injunction as to the taxes, but maintained it in relation to the penalties. From this judgment the defendant, the tax-collector, has appealed. That the state can collect taxes and impose penalties for non-payment thereof, after giving due notice, was recently decided by this court in several cases, especially in the case of Morrison v. Larkin, tax collector. Indeed the proposition is not denied by the plaintiff. It is denied, however, that this right has been conferred on the city of Monroe by the state, and therefore, the defendant has no authority to sell the property of the plaintiff.

Looking to the charter of Monroe we find section 25, which provides:

"That for the purpose of levying and collecting taxes and licenses, the mayor and city council are hereby invested with full power to pass all laws, not inconsistent with the constitution of the United States, or of this state, to compel the payment, by compulsory process, of all taxes or licenses which may be due; and they are hereby authorized to confer on the assessor and collector power sufficient to carry into effect the laws and ordinances pertaining to the levying and collecting of such licenses and taxes." Acts 1871, p. 242.

We think this section confers full authority on the city of Monroe to assess and collect taxes, and to impose penalties for non-payment of taxes. The grant of full power to tax carries with it authority to use all means necessary to accomplish the object, and the imposition of penalties after due notice for non-payment of taxes is a legitimate means of collecting revenue, and it is a means employed by the state in collecting its taxes. The state can confer this power because there is no limitation in the constitution inhibiting it.

As the state can collect, in a summary manner, its taxes and the penalties for non-payment thereof after due notice, it can confer the same power on the political corporation which it employs in administering the government.

There is no force in the objection that section 25 of the charter of the city of Monroe is not covered by the title, and therefore repugnant to article 114 of the constitution, and void.

The title of the charter is: "An act to incorporate the city of Monroe; to fix its boundaries; *to provide for the government*, and create a recorder's court for the same." The statute would fail "*to provide for the government*" of the city of Monroe if it failed to authorize the levy and collection of taxes for the support thereof.

There are other objections, but they are without weight. It is therefore ordered that the judgment appealed from be amended so as to dissolve entirely the injunction sued out by the plaintiff, and as amended that it be affirmed, appellee paying costs of both courts.

NOTE.—*Power to establish fire limits*—The same court, in The Mayor, etc., of Monroe v. Hoffman, held that the right to establish fire limits is given among the municipal powers granted to the incorporation, and that the right to prohibit the erection of wooden buildings carries with it, necessarily, the right to *remove* them when constructed in violation of the prohibition.

We are indebted for the above case to W. W. Farmer, Esq., of Monroe, La.

Admirality Pleading—Libel in Personam—Description of Vessel.

HENRY K. MORREN v. PATRICK KEEN *et al.*

United States District Court, Eastern District of Michigan, August 4, 1874.

Before Hon. JOHN LONGYEAR, District Judge.

1. **Description of Lake Vessel in Libel in Personam.**—In a libel *in personam* against the owners of a lake vessel, it is sufficient to describe the vessel as "the barge Illinois, her boats," etc., without alleging that the vessel is of twenty tons burden or upwards, or that it is enrolled and licensed for the coasting trade, or that it is employed in the business of commerce and navigation, or is capable of being so employed, or without alleging in any other manner that the vessel, her boats, etc., are of such a maritime character as to entitle the court to entertain jurisdiction in the premises.

On demurrer to libel. The libel is *in personam* against the respondents as owners of "the barge Illinois, her boats," etc., for supplies. There is no other or further description of the vessel set up in the libel than that above quoted. The grounds of the demurrer were 1. That it is not alleged in the libel that the vessel was of twenty tons burden or upwards; 2. nor that the vessel was enrolled or licensed for the coasting trade; 3, nor that the vessel was mployed in the business of commerce and navigation, or was capable of being so employed; 4, nor in any manner that the vessel, her boats, etc., were of such a maratime character to entitle the court to entertain jurisdiction in the premises.

Mr. F. H. Canfield, for the demurrer; *Mr. H. B. Brown*, opposed.

LONGYEAR, J.—The libel is in the usual form of libels *in personam* under the general maritime law. 2 Conk. Adm. 478, et seq., 482, 488; Ben. Adm. 2d ed., 554 (No, 83). The allegations, the absence of which constitute the first three grounds of demurrer, were necessary in order to confer jurisdiction under the act of Congress of February 26, 1845 (5 Stat. at Large, 726), entitled "An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same." 2 Conk. Adm. 491, and note a. But the supreme court in the case of The Eagle (8 Wall. 15), adopting the only logical conclusion from

their earlier decision in the case the of Genessee Chief (12 How., 443), authoritively decides that general admiralty jurisdiction was not limited in this country to tide waters, but extended to the lakes and the navigable waters connecting them, and hence that the act of 1845 was insperative and ineffectual, with the exception of the clause which gives either party the right of trial by jury when requested. Since that decision, the limitations as to jurisdiction imposed by the act of 1845 have had no existence, and the necessity of inserting in the libel the allegation in question has ceased; and consequently, a libel which is sufficient under the general maritime law, is now sufficient in cases upon the lakes and their connecting waters. See the General Cass, 4 Ch. Leg. News, 89, S. C. 5 Am. L. T. 12. The first, second and third grounds of demurrer are therefore not well taken.

As to the fourth ground of demurrer, I find no adjudications or opinions of text writers upon the point; but judging from the forms adopted and universally used from an early period in admiralty jurisprudence down to the present time, it seems to have always been considered sufficient to describe a vessel in a libel, whether *in rem* or *in personam*, as the ship, barque, sloop, schooner, steamboat, steamer, barge, or as the case may be, giving her name, without further specification or qualification. See 2 Conk., Adm. 490, note a. These terms seem always to have been considered sufficient to denote the maritime character of the subject. In their ordinary meaning they signify maritime things, and, independently of the consideration of long usage, the use of those terms alone is no doubt sufficient to confer jurisdiction without further description or qualification. The rest follow by necessary implication. If the fact be different, it must be taken advantage of by way of special allegation, and cannot be by way of demurrer. The fourth ground of demurrer is, therefore, also not well taken.

The demurrer must be overruled, with costs of the demurrer to libelant, with leave to respondents to answer the libel on condition of payment of the costs of the demurrer, including a counsel fee of $10.

DEMURRER OVERRULED.

[Communicated.]

Some of the Dying Glories of the Common Law.

LITTLE ROCK, Ark., August 31, 1874.

EDITORS CENTRAL LAW JOURNAL:—On the 27th of August, under the heading "Some of the Dying Glories of the Common Law," it seems to me that you are a too severe. If we examine the reasons for the common law rules in slander, we find much good sense in them, in the light of surrounding customs. To charge a man directly with an indictable crime at common law, subjected the false accusor to an action, because it subjected the party slandered to hue and cry and consequent imprisonment, wherein *habeas corpus*, bail and speedy trial did not figure so readily as now, as well as to the obloquy which followed. The law properly implied damages, at least nominal, to prevent false clamor. Bacon Abridgement, Title, Slander, B. On the other hand, words which imply crime, as "he is forsworn," are not actionable unless spoken concerning a judicial proceeding; while to say that a man is per jured involves a direct charge of crime and is actionable.

The only doubt there would seem to be about the good sense of the common law rule, is the above exception to the general rule in all cases, that damage must accrue before there is a right of action, which makes any class or kind of slander actionable without averment and proof of actual damage. If a man set fire to his field and it burns into his neighbors field, doing no harm, he is liable to no action. If, on the contrary, the fire burns his neighbor's barn, he has a right of action against the one who started the fire. That fixes a uniform rule of consequential damage at common law, to which a limited class of verbal slanders forms an exception. It is difficult to see the difference between the fire in the field and the fire from the tongue. There were reasons for the common law exceptions in slander, which have no force in this country.

If I comprehend you rightly, you, as well Judge HUMPHRIES, who delivered the opinion in the case of Mrs. Pollard, seem to give the impression that to charge one with fornication or adultery is not actionable at any event, and you soundly berate the common law for its faults. In a practice of twenty-three years I have never failed to sustain actions for such slanders; and when the lady was of good repute, never failed to secure heavy damages. It belongs to that class of cases in which you must aver and prove special damage. And it is always possible among a lady's friends to prove that some one shunned her society on account of the slander, or that she lost an opportunity of favorable marriage. The loss of an acquaintance is sufficient to give the right of action. See precedent for it, 2 Chitty's Pleading, 641. The special damage sufficient to support an action, must be a certain actual loss (as of a particular marriage) or the *acquaintance* or *friendship* of some *specified* person. 1 Rol. Ab. 36; 1 Lev. 261; 2 Bos. and Pul. 284; 1 Saund. 243; 3 B. and P. 372-4-6: 1 Taunt. 39; Bacon Ab. Slander C.; 8 T. R. 130. See also precedent for charging a governess with fornication, 2 Chitty's Pleading, 641 b.

In Mrs. Pollard's case it seems the loss of it was more the fault of the lawyer than the law; for he surely could have proved, and must have done so, special damage, to have recovered $10,000; otherwise even in actionable (*per se*) slander, his damage must have been nominal. Why did he not aver it and save his case? If his client did not suffer damage, she ought not to have her action; if she did, let her aver it, and she has a case in which the judgment cannot be arrested.

The rule is laid down in the 1st vol. of Chitty's Pleading, page 395, as follows: "Damages are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of; special damages are such as really took place, and are not implied by law, and are eithersuper added to general damages arising from an act injurious in itself, as when some particular loss arises from uttering of slanderous words, actionable in themselves, or are such as arise from an act indifferent, and not actionable in itself, but injurious only in consequences." At page 396, the same author says: "So, in an action for words, not actionable in themselves, but becoming so only in respect of particular damage." And again at page 397, he says: If an action be brought for words, not in themselves actionable, and the plaintiff does not prove the special damage laid in the declaration, he will be non-suited, because the special damage is in such case the gist of the action; but when the words are of themselves actionable, the jury must find for the plaintiff, though no special damage be proved." If a man is slandered in his business, he has no right of action except he aver, and prove special damage. We have now in Arkansas a statute which makes words charging any one with adultery or fornication liable to an action. Since the decision in McGough v. Rhodes, 12 Arkansas, 625, it is very doubtful whether it dispenses with averment and proof of special damage—whether it does more than re-enact the common law. Yet is it right that the law should presume anything about it? What right has any one, not damaged, to recover anything? The common law presumed damage from the use of words which charged another with crime. This presumption was conclusive. See 1 Chitty's Pleading, 407; 6 Term Rep. (Durnf. & East) 691.

It seems that if any part of the common law rules as applicable to slander, has grown absurd in the light of modern civilization, it is that which presumes damages, as a legal conclusion, and encourages vexatious suits in cases where no real real damage occurs; hence slander suits have grown into general disrepute.

SAM. W. WILLIAMS.

REMARKS.—It is possible that we did not make ourselves clearly understood in the article referred to. Perhaps we should have qualified what we wrote, so as to make it read that the law awards no punishment and affords no redress against him who imputes to a woman a want of chastity, *unless such imputation has occasioned her pecuniary loss*. By recurring to an article on "Councils of Honor," in a previous number (*ante*, p. 396), our correspondent will perhaps be able to understand more fully the nature of our criticism upon the common law rule. It is this: That the common law gives damages, not for the outraged feelings — not for the *defamation*, but only for the *pecuniary loss* which may or may not happen in consequence. In other words, as clearly and convincingly shown by Mr Townsend, in his work on Slander and Libel, § 57, "The protection is to the *property* and not to the *reputation*." "When we consider," says this learned and philosopical writer, "that falsely and maliciously to impute, in the coarsest terms and on the most public occasion, want of chastity to a woman of high station and unspotted character, or want of veracity or courage to a gentleman of undoubted honesty and honor, cannot be made the foundation of any proceeding, civil or criminal; whereas, an action may be maintained for saying that a cobbler is unskillful in mending shoes, or that any one has held up his hand in a threatening posture to another, it would seem to need nothing more to satisfy the most skeptical that the protection is to the property and not to the reputation." Ibid.

But our correspondent fully asserts, and very clearly expounds this principle, when he calls attention to the familiar rules of the common law, with reference to *special damage* in actions resulting from a defamation of the character. The point wherein we seem to differ is this: He believes that there should be no words actionable *per se*—that pecuniary damage should be averred and proved in all cases; we believe that pecuniary loss should not constitute the gist of the action at all, but that the action should be given for the outraged feelings and impairment of the reputation, whether it entail any pecuniary damage or not. We think that the principle that the action

is given for pecuniary loss, is a barbarous relic of the old Saxon codes —one of the "dying glories of the common law," which modern courts have relieved against by a number of ingenious devices and fictions, not the least of which is that fiction to which our correspondent calls attention, which makes the loss of a *friend* or *companion* evidence of pecuniary loss. Unable to abrogate the rule itself, without incurring the imputation of usurping the functions of the legislature, the courts have also (as we think) relieved against it liberally and beneficially, by extending from time to time the number of verbal slanders from which the law will conclusively presume pecuniary loss—in other words the slanders which are actionable *per se*. And it would really seem that the chivalrous judges of the common law might, while protecting the professional reputation of a cobbler, and making it actionable to call a man a bogus peddler (Pike v. Van Wormer, 6 How. Pr. 101), or a vagrant (Miles v. Oldfield, 4 Yeates, 423), have extended the same beneficial rule, so as to protect the reputation, and silence the defamer of woman.

But the common law has never been imbued with this spirit. If it had, we never should have had the barbarous rule that a father can only recover damages for the seduction of his infant daughter, on the ground that she is his *servant*, and that her seduction has deprived him of her service, and thereby entailed upon him pecuniary loss. We cannot avoid thinking that such principles of law are better adapted to the code of the Sandwich Islanders, than to that of an enlightened and honorable people.

Fiction is at once the courage and the cowadice of the law. For while a king brandished the sword of state over the heads of his judges, and threatened them with the Tower, they may have been excused in resorting to fictions in order to change unjust and unyielding rules of law—since artifice is the only weapon of the slave against the master, of the weak against the strong. And it may, and doubtless often did, require great courage to do even this. But it is at the same time cowardly to say one thing and mean another, and in a court of justice where the truth ought always to be spoken, this out not to be done. But if, as our correspondent seems to imply, the earlier judges of the common law have succeeded in reforming the law of slander by fictions and devices, so as to protect the reputation of woman, why should our courts of justice at the present day, adhere to those fictions and devices? Under what obligation are they to continue to say one thing and mean another? Why ought they not to do what seems more worthy of a court of justice, cast aside the fiction—the falsehood—and advance directly to the truth? Instead of reforming this ancient barbarism "indifferently," why should they not "reform it altogether?"

[From our own correspondent.]

Judge Shaw.

BOSTON, August, 1874.

EDITORS CENTRAL LAW JOURNAL:—It is not easy to estimate the value of Judge SHAW'S labors. Only those who knew him when living, and saw what and how much he did, and how admirably he did it all, and have observed and considered the influence and effect of his labors, both while he lived and since his death, are competent to form a just estimate of their value; and even the estimate of such, must in some respects at least, be inadequate. But the judgment of all such will be found to be that he was both a great and a good magistrate. For thirty years he sat in the seat of the chief justice of this commonwealth. He was appointed in 1830, and he resigned in 1860. Among all his associates during these years, learned and able as many of them were, he was indeed chief. Once or twice only, on some question, the majority of the court was against him, and then he dissented. His dissent was respectful and manly. The chance is, he was right. He tried or heard more causes in these thirty years, it is believed, than any other judge. His first opinion will be found in the 10th of Pickering, which contains also more than twenty other opinions that were written by him. Many of the questions considered in the course of this long period are new; many are quite complicated—some are of great public concern—in respect of some, the puplic mind was excited and divided; parties were hostile and clamorous; there was intense feeling; sometimes the just cause was the unpopular. Yet in all these cases he was master. The just cause, through him largely, if not chiefly, prevailed; the beneficient end was answered. Everybody felt that he got to the bottom of things; all knew that he was honest. He did not excite enthusiasm, but he commanded the general respect. He dealt only with the understanding,—which Locke calls the most elevated faculty of the soul. There was no rubbish in his mind. In investigation, he advanced step by step only. He verified as he went. In difficulties, so far as depended on him, he saved the commonwealth from reproach. He was independent. He kept his conscience and his shirt clean. His personal wants were few, and he had the means to supply them. Above all, he was courageous. He pursued the way his understanding pointed. He did not overlook the law in any vain expectation that somehow, somewhere in the empyrean, he might find a law still higher; but he took as his guide the constitution and law of the land and of the seas, as he found it, and diligently sought to find out what, in truth, these imported. And when he had decided a case, discussion stopped. With equal courage and independence, he had a finer understanding and was withal a better writer than Lord HOLT,—whom, in some respects, he resembled.

Sir EDWARD COKE was great. Neither was he wanting in courage. When the king said to to him—"So, I am under the law?"—COKE replied—"yes, you are." At another time, he declared that the king could not, by his proclamation, make that an offense which was not an offense before; "for if he may," said COKE, "then he may change the law of the land in a high point." He declared that the king had no prerogative but that which the law of the land gave to him. He carried the resolutions, which, a half a century later, were the foundation of the *habeas corpus* act. He advocated free trade. It is said he never deserted a friend; nor took a bribe; nor corrupted anybody; —and I can well believe it. He delighted in his morning bath, and in clean clothes. He was temperate. He was committed to the Tower—that nice little place on the Northern bank of the Thames, into which, in these last years of the nineteenth century, if you, a visitor in London will pay a shilling and wait until a party of twelve such is assembled, a man, dressed in a fool's uniform, with a long staff in his hand, will conduct you, and tell you all about the Traitor's Gate, and the Bloody Tower, and the Bell Tower and the Flint Tower, and divers other such nice little Towers and things, and show you where the good Sir SIMON BURLEY was beheaded in 1388; where the Duke of Clarence, brother of Edward the Fourth, was drowned in Malmsey wine; where the gay Edward sickened and died, and where his three children were murdered in the Bloody Tower,—from whence Jane Shore was released only to die in poverty; and Annie Askeed was tortured, and Jeffries ended his life in captivity, and the beautifuld Lady Jane Gray was beheaded on the Green, and the pious Annie Boleyn, after being beheaded, was thrust into an old chest and put in the vault of the chapel; and Margaret, the last of the Plantagenets, was brought to the Block, and Cranmer, Ridley and Latimer were imprisoned, and the great Sir Walter Raleigh was simply beheaded in 1618,—pointing out to you, as you go along, many other such pretty and strange and wonderful things, including all sorts of armour worn by all sorts of men and boys, except only the men of sense—and the head-blocks and thumb-screws and limb-stretchers and crown jewels,—all of which, I suppose, teaches, or is designed to teach, that in England there has been progress toward a better state of things in these centuries—and is certainly cheap at a shilling;—into this nice and instructive place, I say, Chief Justice COKE was thrust, as a prisoner, and thither went, as a brave man ought, and as in like case Judge SHAW would have done, rather than declare the law to be what he knew it was not; and there, in the few months that he was kept, he wrote the finest part of his "Commentaries on Littleton." Honor and thanks to Sir Edward Coke through this and all the succeeding centuries. But, alas! the greatest of men even sometimes make mistakes, and Sir Edward is not an exception to this rule. When he was liberated, he suffered himself to be elected sheriff for Suffolk and Buckinghamshire, and in the exemplary discharge of his duties as such, he stood, as was the custom, with a white wand in his hand, behind the puisne judges, who were not worthy or but just worthy, to shine his boots, and held the court room doors open while they strutted their brief strut in and out. All honor to the memory of Judge SHAW! Sooner than have done that, it is my belief, if there were need, he would have wheeled a barrow in any honest business of his own,—which, happily, in all that part of his life from ten to eighty, he was just able to do.

PELHAM.

Notes and Queries.

BLOOMINGTON, ILL., Sept. 2d, 1874.

EDITORS CENTRAL LAW JOURNAL:—In 1857, A. and B. bought of C. two lots in the city of B——. Five hundred dollars to be paid down, and two notes, one payable in one year, the other two years with interest, each drawn in the sum of $300, constituted the consideration.

As between themselves, A. and B. agreed, by parol, that A. should pay the five hundred dollars down, and that B. should lift the two notes as they became due. A. complied with his part of this agreement, but B. failed to take up the two notes, or either of them; whereupon, A. also paid the notes. These notes were signed by A. and B. jointly. A. has been in possession, and had control of the property ever since its purchase.

Now, the question is, has B. any interest in the lots which the law will recognize? Will not a court of equity compel B. to give to a A. a quit-claim deed? Or, in other words, what is A.'s remedy, the record showing that the property was conveyed to A. and B., and the facts showing that A. alone paid the purchase price of the same? Please answer in the next number of the JOURNAL, and much oblige yours, etc., C. D. M.

ANSWER.—The *title* being in A. and B. there is nothing stated which would make B. a trustee of the *title* for A. A.'s remedy is to have equity charge the $600, with interest on the lots, thus subrogating A. in the place of the vendor.

If A.'s possession has been *adverse* to B. for the requisite length of time under the laws of Illinois, he would need no remedy, as he would have a title in this way.

SHELBINA, MO., Sept. 2d, 1874.

EDITORS CENTRAL LAW JOURNAL:—A note given, payable four years after date, with following interest clause: "Interest ten per cent., said interest to be paid annually; and if we fail to pay the interest when due, it is to bear the same rate of interest as the principal." Now, the note is secured by deed of trust, providing, that upon failure to pay any part of the principal or interest when due, the whole shall become due and payable, and that the trustee may proceed to foreclose the deed. Can the deed be foreclosed for failure to pay the interest at the end of the first year? Or, in other words, if there was no deed securing the payment of the note, could the interest be collected at the end of the year? Or is it optional with the payee whether he pay the interest at the end of the year, or pay interest on interest until such time as he does pay it? Very respectfully yours, C. M. K.

ANSWER.—The interest is due annually. The contract so states; and the purpose of the last clause is not to give the maker an option to delay payment of interest four years, or at his pleasure, but to give the holder the right to 10 per cent. interest on interest, if the annual interest be not paid.

MARYSVILLE, KANSAS, Aug. 14, 1874.

EDITORS CENTRAL LAW JOURNAL:—Have there been any decisions declaring the loans made by building associations to their stockholders usurious, and where can I find them? J. D. B.

ANSWER.—Such loans (including those of "loan fund associations") have been decided usurious in the following cases: Martin v. Nashville Building Association, 2 Coldwell, (Tenn.) 418; Philanthropic Building Association v. McKnight, 35 Penn. State, 470; Columbia Building Association v. Ballinger, 12 Richardson, (S. C.) Eq. 124; Houser v. Hermann Building Ass., 41 Penn. State, 478; Reiser v. William Tell, etc., Ass., 39 Penn. State, 137; Denny v. West Phila., etc., Ass., Ib. 154; Premium Fund Association's Appeal, Ib. 156; Melville v. American, etc., Ass., 33 Barbour, 103; Savings Bank v. Wilcox, 24 Conn. 147. See Parker v. Fulton Loan and Building Association, 46 Ga. 166; Bibb County Loan Association v. Richards, 21 Ga. 592; Silver v. Barns, 6 Bing. N. C. 180; Burbridge v. Colton, 8 Eng. L. & Eq. 62; Cutbill v. Kingdom, 1 Wellb. H. & G. 494; Delano v. Wild, 6 Allen, 1; Bowker v. Mill River Association, 7 Allen, 100; Hoboken, etc., Ass. v. Martin, 2 Beasley, 427; Shannon v. Dunn, 43 N. H. 194; Franklin, etc., Ass. v. Marsh, 5 Dutcher, 225; Merrill v. McIntire, 13 Gray, 157; West Winstead Savings Bank, etc., v. Ford, 27 Conn. 282; Citizens' Mutual Loan Ass. v. Webster, 25 Barb. 263.

BRENHAM, TEX., Sept. 1, 1874.

EDITORS CENTRAL LAW JOURNAL:—On page 85 of No. 7 of the JOURNAL for February last, you discuss the question whether or not the homestead, exempted by law from forced sale, descends to the wife in fee simple, at the death of her husband, in Missouri. In Texas, with her liberal exemption laws, the question becomes an interesting one; but, as yet, we have had no decision of it. The Vermont decisions, as it seems, turn upon the construction of the 5th sec. of the homestead act, and if it is not asking too much, we will be obliged to you if you will publish that section in an early number of your journal. Respectfully,

S. & G.

ANSWER.—Section 5 of the Vermont statute, above referred to, reads as follows:

"If any such housekeeper or head of the family shall die, leaving a widow or any minor children, his homestead, to the value aforesaid, shall pass to and vest in such widow or children, or, if there shall be both, in such widow and children, without being subject to the payment of the debts of the deceased, unless legally charged thereon in his life-time; and such widow and children, respectively, shall take the same estate therein of which the deceased died seized; provided, that such children shall, by force of this chapter, only have an interest in such homestead until they shall attain their majority; and the probate court having jurisdiction of the estate of such deceased housekeeper or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the persons entitled thereto." Gen. Stats. Vt. ed. of 1863, pp. 456-7.

There are some other decisions bearing upon this point which we have not heretofore noticed, and we hope to find time hereafter to collate them. The courts of Massachusetts use the expression "the estate of homestead." The question has been passed upon in several California cases, the result being, if we remember rightly, that there are no terms known to the common law which will accurately describe the estate which descends to the widow and child under the homestead law of that state.

MARYVILLE, TENNESSEE, August 14, 1874.

EDITORS CENTRAL LAW JOURNAL:—A. owns a tract of land; in the summer of 1873 he harvested a crop of oats off a certain field; in the month of September, 1873, he leased the same field to B., to be sown in wheat, expressly stipulating that the field should be cultivated in wheat. B., sowed the field in wheat, but from some cause, either a *freeze out* or faulty seed, the wheat in the spring failed to put in an appearanee, but in its room and stead a very fine *volunteer* oat crop grew and matured on the same land, the oats springing from the seed wasted from crop of previous year. The lessee was to receive *two-thirds* of the *wheat* grown, *he furnishing the seed wheat.* What are the legal rights of the lessee in the crop of oats?

Has he any interest in, or is he entitled to any part of the oat crop, if so, what part?

Please answer through columns of CENTRAL LAW JOURNAL.

ENQUIRER.

ANSWER.—If the lease extended beyond the harvest period for the oats, and the lessee was in possession, he would have the right to gather the oats, but would have to account for the fair or customary use of the land. A contingency happened not anticipated by the parties, and in relation to which the contract did not determine their rights: and hence the law will regulate their rights according to the principles of justice and right.

Summary of our Exchanges.

The Chicago Legal News, for September 5, publishes the opinion of Mr. Chief Justice Waite, in the United States Supreme Court, construing the laws of Congress relating to the pre-emption and entry of government lands, and stating the effect to be given to the opinions of the government officers in determining the rights of contesting claimants under such laws.

Also the decision of Mr. Chief Justice Waite in Self v. Jenkins, United States Circuit Court, Eastern District of North Carolina, holding that a court of equity has no power to restrain the treasurer of a state from paying out money in pursuance of law, on the ground that an earlier appropriation for a specific purpose had been misapplied.

Also McMarren v. Kean, published in this issue of this Journal.

Also The Heroine, a suit in Admiralty before Mr. District Judge Deady, of the District of Oregon, by seamen of the British barque Heroine, for wages. Several interesting points in admiralty law are ruled.

Also Merrick v. Davis, Supreme Court of Illinois, which was a trial of the right of property in a growing crop.

The Washington Law Reporter, for September 1, publishes Deener v. Brown, Supreme Court, District of Columbia, General Term, determining the rights and liabilities of the parties to a bank cheque where there has been delay in presenting it for payment.

Also a decision of the secretary of the Interior, of which the following is a syllabus: "For ascertaining the proper and necessary recitals of a patent in a given case, the applicant is bound by the terms and disclosures of such filings as, conformably with the law, he rests his right to enter and purchase upon; and for the further ascertainment and protection of rights, and as a duty on the part of the government, the examination of the general land office should, whether protest be filed or not, proceed beyond the papers filed by the applicant, and into those *general records* of the office, which evidence the final disposition made of the public domain; and if, upon examination, it is found tha any part of the premises applied for has been previously disposed of, express exception thereof should be inserted in the subsequent patent."

It also reprints from the Chicago Legal News, Butler v. Huestis, which we have already noticed.

The Chicago Railway Review, for September 5, republishes Randall v. Ewell, 52 N. Y. 521, and also notes of several interesting decisions in railway law.

The following is a summary of the principal contents of the American law Register for September:

Rights of Surities *Inter-Sese.*

Frost v. Plumb, Supreme Court of Errors of Connecticut.—Injury to horse for unlawful purpose—hirer liable for tortious injury to horse, notwithstanding illegality of contract—distinction between acts which are merely breaches of the illegal contract and independent torts. Odinion by Carpenter, J. Note.

Glenden Iron Co. v. Uhler, Supreme Court of Pennsylvania.—Trade-mark—geographical name—name of incorporated town cannot constitute a valid trade-mark, although adopted and used prior to the incorporation. Opinion by Mercur, J. Note.

Martin v. Robson, Supreme Court of Illinois.—Husband and wife—rule as to liability of husband for torts of the wife committed during coverture—modification in the rule is required in states where by statute the sole control of her property and earnings is given to married a woman—husband not liable in Illinois where the act is committed out of his presence, and without his partici-

pation. Opinions by Thornton, J., and by Sheldon, J., dissenting. Note.

The Pennsylvania, United States District Court, Eastern District of Pennsylvania.—Admiralty—salvage service may, in exceptional cases, be rendered by a passenger, although he has no opportunity to leave the ship—reduction of salvage allowance, for subsequent assumption of illegal authority. Opinion by Cadwalader, J.

Pittsburgh, etc., R. R. Co. v. Andrews, Court of Appeals of Maryland.—Negligence—passenger in railroad train putting his arm out of the window is guilty of such contributory negligence as requires the court to say, as matter of law, that he cannot recover. Opinion by Miller, J.

Swasey v. Antram, Supreme Court of Ohio.—Joint action—Judgment against all the defendants after death of one, is voidable—married woman has no authority to enter a general mercantile business—business treated as the husband's. Opinion by Welch, J.

The Irish Law Times, for August 22, continues its leader on Life Insurance Law and Legislation. It also republishes from the Solicitor's Journal, a compendium of the proposed new rules of practice under the English judicature act, which takes effect in November. This will prove of much interest to those who have leisure to watch the progress of law reform in England, but any attempt to condense it would be futile.

The Albany Law Journal, for September 5, comes to us with its usual amount of excellent matter. An article on the Contracts of Married Women, appears to be a review of some of the points of a former contribution to that journal, by Mr. Proffatt, of New York City.

In discussing the ruling of Mr. Justice Hunt, in denying Miss Susan B. Anthony the verdict of a jury in the prosecution against her for illegal voting, the learned editor of the Albany Law Journal seems to have got himself into a regular hornet's nest. Mrs. Matilda Josslyn Gage "went for him" in the Syracuse Journal, and showered a perfect hail-storm of invective upon his devoted head. If every epithet had been a brick-bat there wouldn't have been a grease-spot left of him. He seems, however, to have endured it with the same philosophic placidity with which the Wandering Jew received the volley of grape-shot; and now he turns upon his persecutor with a weapon so sharp, and with a speech so caustic, that it would make a man cry "O, don't!"

The Albany Law Journal also publishes Madras Railway Co. v. The Zemindar of Carvetingarum, before the judicial committee of the privy council, which hold that the principle that if a man bring and accumulate upon his land anything which, if it escape, may cause damage to his neighbor he does so at his peril, is not applicable to the case of water stored in tanks in India, which have existed from time immemorial, and are preserved and repaired by the landowners by reason of their tenure, as essential to the welfare and existence of the people.

Also Commercial Bank of Cleveland v. Simmons, which we have heretofore noticed, in which Mr. District Judge Walker holds that the right of the national banks to sue is not controlled by the judiciary act, but by the national banking law of 1864.

The Legal Gazette, for September 4, reports Mercantile Insurance Co. v. Folsom, Supreme Court of the United States, in which it is ruled that contracts of insurance which clearly show that it was the intention to make them operate retroactively, are as valid as those intended to cover a subsequent loss, if it appears that the insured as well as the underwriter was ignorant of the loss at the time the contract was made.

And also that, where upon a submission of the facts to the court below, the finding is general, nothing is open to review but the rulings of the court *in the progress of the trial.*

It also publishes Davenport v. Dows, same court, where it is ruled that although a stockholder may bring a suit when the corporation refuses, as is settled in Dodge v. Wolsey, 18 Howard, 340, yet such a suit can only be maintained on the ground that the rights of the corporation are involved; and that where such suit is commenced the corporation must be made a party.

The Legal Gazette also publishes The Chicago City Railroad Co. v. Allenton, which it credits to the Chicago Legal News, but with a syllabus for which the editor of the Gazette claims credit. It is as follows:

1. The directors of a street railway corporation in Chicago "resolved to increase the capital stock of the company." *Held*, that their charter did not give the directors power to increase the stock, without the consent of the stockholders, and their action was therefore illegal.

2. The constitutional question involved in the case *shirked* by the supreme court.

The Legal Gazette also publishes the proposed amendments to the constitution of Michigan, and several interesting Pennsylvania statutes.

The Financier, for September 5, comes to us with a 24-page supplement containing a statement, in tabular form, with remarks, of the funded debt of the states and principal cities and railroad corporations in the United States. It will prove of immense value to financial men and investors.

The Legal Intelligencer, for September 4, contains a number of interesting decisions of the Supreme Court of Pennsylvania. Among them we note Gallagher's appeal, in which it is decided that a bequest of the interest of a certain mortgage for life is a specific legacy, and if the specific security is lost the legatee takes nothing; and that a widow, electing to take against the will, takes nothing specifically, but under and through the executor.

The following is the almost unintelligible syllabus of Resser v. Johnson.

1. A plaintiff will not be restrained from selling an alleged interest in real estate of his judgment debtor, unless the want of such interest is clear and manifest. The determination of title will be left to an ejectment.

2. In this case the invalidity of plaintiff's lien by reason of defendant's adjudicated bankruptcy was not sufficiently clear to justify an order restraining execution.

In the case of Peterman's estate it is ruled that an assignor for benefit of creditors, reserving the benefit of the exemption act, is entitled to select out of what property he pleases. The appraisers of the assigned estate must appraise what he retains. It is not laches for him to wait until the sale of realty in which he had an undivided interest, and then claim his exemption out of its proceeds.

The following is the syllabus of Hays v. Briggs:

The Act of 1843 and 1871 relating to lateral railroads, give appeals upon the questions of *compensation* and *necessity* for land taken, but not as to *location*. Whether the petitioner is allowed too little space, is to be determined upon exceptions to the report of the viewers.

The acts give a right to take land for wharfage, but not for harborage.

A lateral railway may cross a carrying railway to reach navigation.

The owner of land on the margin of a river is protected from having it taken for the use of a lateral railway, if he, *bona fide*, intends to use it for such purpose himself, although compelled to defer present improvement.

Testimony of special instances of sale is not competent upon the question of the value of land taken.

In Torrens *et al.* v. Campbell, it appeared that A., by writing, purchased the business and assets of B., and agreed to pay his debts. In a suit on this promise by C., a creditor of B., *held:* That it was admissable to prove that at the time of the agreement, B. exhibited a list of his debts, on the strength of which the promise was made, which list did not contain C.'s debt. *Held* also, that the action could be maintained by C. in his own right and name, as A. had received assets from B., the promisee, at the time of the promise.

The Legal Intelligencer also publishes an English decision (Vice Chancellor Bacon) on Trade Marks.

The Washington Law Reporter for August 18, publishes Barnes v. The District of Columbia, in which the Supreme Court of the district expound the liability of the district under its present government, for injuries to persons falling into excavations in its streets. This is an interesting case, and we shall notice it hereafter.

The Reporter also reprints from the Chicago Legal News the case of Heffron, which we have heretofore noticed.

It also publishes a decision of the secretary of the interior, of which the following is the syllabus:

"1 Land, when once appropriated under the homestead law, is thereafter removed from pre-emption settlement and homestead entry, and can only be again subject to them by a cancellation of the homestead entry in the manner prescribed by law.

"2. Such cancellation becomes effective at the date of the receipt of the order therefor at the local office.

"3. To initiate a valid right, under the pre-emption law, to a tract of land, covered by a homestead entry, some act of settlement must be performed by the pre-emptor, *subsequently* to the cancellation of said homestead entry."

Our other exchanges, so far as received, do not appear to contain much matter of general interest.

Legal News and Notes.

—HENRY SLATER, a prominent member of the bar of Baltimore, committed suicide the other day, by cutting his throat.

—A boarding-house keeper in Trenton, N. J., has brought suit against the owner of a bee-hive to recover damages for continued invasions of her dining-room by the bees at meal-times, stinging and driving away the boarders; and, out West, a bequest of money to a priest, to be expended in masses for the soul of the testator, is contested on the ground of its being contrary to public policy.—[*Albany Law Journal.*

—ELEVEN jurisconsults, designated by the German imperial government to prepare a civil code, have accepted the duty.

—JOSEPH H. BRADLEY, Jr., a prominent member of the Washington bar, died recently in that city.

—HON. E. M. PAXSON, Judge of the Court of Common Pleas of Philadelphia, and Warren J. Woodward, President Judge of the Court of Common Pleas of Berks, have been nominated for judges of the Supreme Court of Pennsylvania.

—ALEXANDER MCKINLEY, Esq., formerly an active member of the Philadelphia bar, but more recently flag secretary under Admirals Dupont, Thatcher and Farragut, respectively, died recently in Philadelphia.

—THE attorney-general has decided that the proviso in the army appropriation bill of the last session of Congress, to the effect that only traveling expenses shall be allowed to any person holding employment or appointment under the United States, supersedes and cuts off the allowance of mileage to United States marshals, as provided in the fee bill.

—A curious exemplification of the value of extradition laws was furnished in the courts yesterday by the arrest of a merchant charged with burglary committed at Stockholm, in July last. The man confessed his crime and will probably be sent back to Sweden to stand his trial. With the progress of enlightenment, dishonest people may probably discover that roguery does not pay.—[*New York Herald, Aug. 31st.*

—THE Legal Chronicle, speaking of the late decision of the Court of Claims in refusing to admit Mrs. Lockwood as a solicitor, says: "We do not believe that the bar at large will support the decision of Judge Nott, for much as they dislike to see a woman move into a sphere which does not seem to be her own, yet they are far too chivalric to help crush her, or deny her the right to earn her daily bread as she may best be qualified, merely *because she is a woman.*"

—WE learn that thirty-six essays, written in German, English, French and Italian, have been sent into the Social Science Association by competitors for the prize of £300 placed at the disposal of the association by his Excellency Don Arturo de Marcoartu, ex-deputy to the Cortes in Spain, and to be awarded for the best essay on the following subject: "In what way ought an international assembly to be constituted for the formation of a code of public international law, and what ought to be the leading principles on which such a code should be framed?"

—THE Illinois Wesleyan University of Bloomington, Illinois, has a law department: Ruben M. Benjamin, A. M., is dean and professor of Property, Contracts and Domestic Relations. Owen T. Reeves, A. M., is professor of Pleading, Evidence and Equity Jurisprudence. Robert E. Williams, Esq., is professor of Constitutional, International and Criminal Law. The course of instruction is two years in duration, and is by recitation and lectures. Its graduates are entitled to admission to the bar without further examination.

—THE association for the reform and codification of international law, established last year in Brussels, will hold its second annual meeting at the Hotel de Ville, Geneva, on September 7. It is expected that the conference will be attended by many eminent publicists of Europe and America. The Law Magazine and Review says: "The English bar will likewise be represented. Sir Vernon Harcourt, Mr. Hinde Palmer, Mr. Osborne Morgan, Sergeant Simon, and others have been invited to attend. Mr. Thomas Webster will read a paper on Property in Intellectual Labor; Mr. H. D. Jencken, the general secretary of the association, has argeed to bring forward in a treatise he has prepared, the very important question of 'The International Laws regulating Negotiable Securities,' including bonds and shares. Professor Amos and Professor Leone Levi will also, it is hoped, be present, and contribute their share to the valuable matters to be considered at the conference."—[*Albany Law Journal.*

—THE biography of Salmon P. Chase, by his private secretary, contains the following extract from a letter written by Mr. Chase, June 2, 1863, to Mr. Jay Cooke. It is an honor to his memory, and exhibits his character in striking contrast from that which is implied in the base suggestion that his opinion in the Legal Tender case was influenced by the motive of promoting his chances as a candidate for the presidency:

"You informed me two or three weeks ago that you had purchased 300 shares of Philadelphia and Erie railroad stock for me. At that time I was expecting means of payment from the sale of a farm in Ohio, and would have been glad to hold the stock for income. The sale, however, has not yet been effected, and I have, therefore, not been able to make payment. This morning I have yours of yesterday, notifying me that you have sold the stock at an advance which gives a profit of $4,200 on the transaction, and you inclose me a check for that amount. As I had not paid for the stock, and did not contemplate purchasing with any view to resale, I cannot regard the profits as mine, and therefore return the check for $4,200. It is herewith enclosed. I am much obliged to you for your willingness to regard the money paid for the stock as a temporary loan from you to me. But I cannot accept the favor. When Congress, at the last session, saw fit to clothe me with very large powers over currency and financial movements, I determined to avoid every act which could give occasion to any suspicion that I would use the powers conferred on me to effect markets unnecessarily, or at all, with reference to the private advantage of anybody. To carry out this determination faithfully, I must decline to receive any advantage from purchases or sales made with views to profits expected from the rise or fall of market prices. For these reasons I must decline to receive the check. For, in order to be able to render the most efficient service to our country, it is essential for me to *be* right as well as to *seem* right, and *seem* right as well as to *be* right."

—THE CRIMINAL QUÆSTION OF THE ROMAN JURISPRUDENCE.—The deceitful and dangerous experiment of the criminal *quæstion*, as it is emphatically styled, was admitted rather than approved in the jurisprudence of the Romans. They applied this sanguinary mode of examination only to servile bodies, whose sufferings were seldom weighed by those haughty republicans in the scales of justice or humanity; but they would never consent to violate the sacred person of a citizen, till they possessed the clearest evidence of guilt. The annals of tyranny from the reign of Tiberius to that of Domitian, circumstantially relate the execution of many innocent victims; but, as long as the faintest remembrance was left alive of the national freedom and honor, the last hours of a Roman were secure from ignominious torture. The conduct of the provincial magistrates was not, however, regulated by the practice of the city, or the strict maxims of the civilians. They found the use of torture established, not only among the slaves of oriental despotism, but among the Macedonians, who obeyed a limited monarch; among the Rhodians, who flourished by the liberty of commerce; and even among the sage Athenians, who had asserted and adorned the dignity of human kind. The acquiesence of the provincials encouraged their governors to acquire, or perhaps to usurp, a discretionary power of employing the rack to extort from vagrants or plebeian criminals a confession of their guilt, till they insensibly proceeded to confound the distinction of rank, and to disregard the privileges of Roman citizens. The apprehensions of the subjects urged them to solicit, and the interest of the sovereign engaged him to grant, a variety of special exemptions, which tacity allowed, and even authorized, the general use of torture. They protected all persons of illustrious and honorable rank, bishops and their presbyters, professors of the liberal arts, soldiers and their families, municipal officers, and their prosterity to the third generation, and all children under the age of puberty. But a fatal maxim was introduced into the new jurisprudence of the empire, that in the case of treason, which included every offence that the subtlety of lawyers could derive from an *hostile intention* towards the prince or republic, all privileges were suspended, and all conditions were reduced to the same ignominious level. As the safety of the emperor was avowedly preferred to every consideration of justice and humanity, the dignity of age and the tenderness of youth were alike exposed to the most cruel tortures; and the terrors of a malicious information, which might select them as the accomplices, or even as the witnesses, perhaps, of an imaginary crime, perpetually hung over the heads of the principal citizens of the Roman world.—[*Gibbon.*

Notes of Cases.

[These notes of cases are either prepared or selected with care by one of the editors.]

A novel question was presented in Williams v. Firemen's Fund Insurance Co., 54 N. Y. 569. The action was on a fire policy, containing a prohibition against storing petroleum, etc., on the premises. The defendant claimed an infraction of this provision. It seemed that the plaintiff, who had been in the army during the late war, had received a gun-shot wound resulting in a cutaneous disorder, which he treated by an application of crude petroleum oil to the surface of his body, and for that purpose he kept crude petroleum in a jug on a shelf in his room, and had some quarts of it in the building at the time of the fire, It was not pretended that the fire proceeded from or was aided by this material. The court held that this was not a "storing" within the meaning of the policy. Commissioner Reynolds suggested that even if the plaintiff had taken a quantity of the oil internally it would not have amounted to a "storing" on the premises. We are very glad this is so settled. Any other decision would have been an ungenerous requital for the sufferings of the plaintiff in the cause of his country, and would operate to retard enlistments in the event of another unholy rebellion. Let it once be adjudged that a man must not only bleed but itch for his country, unallayed by emollients of an inflamable nature, or run the risk of having his property destroyed by fire, without the power of enforcing his insurance, and our liberties are no longer secure.—[*Albany Law Journal.*

Partnership—Substitution of New Members for Old without Changing Firm Name—Rights of Creditors Against Retiring Partner.—The case of Speer v. Bishop, published in the American Law Record for August, was a decision of the Supreme Court, Cincinnati, in general term, before Judges O'CONNOR, TILDEN and YAPLE. It presents a highly interesting and oft-recurring question in the law of partnerships. The decision is not final, the case having been appealed to the Supreme Court.

H. S. & Co., composed of H. S. and one of his sons, were copartners under that firm name, doing business for a number of years in the city of C., when they removed to the city of B., and carried on business there as partners, under the same firm name, H. S. always being the monied man of the firm, and having a good reputation and credit as a business man; and while in B. they also kept an office in the firm name of the city of C. They dissolved their copartnership, H. S. retiring from the firm, and another of his sons entering it with the other, the first partner. Neither bore the name of H. S., the name of the father. By agreement, the new firm took the claims and assumed the debts of the old firm, and the new firm was to and did continue business under the old firm name of H. S. & Co. H. S. recommended the new firm under the former to the old customers. Notice of this change, etc., was duly published in the newspapers printed in the cities of C. and B., and advisory letters were sent to all who had formerly dealt with the old firm. B. & Co., merchants of the city of C., were strangers to the old and new firms, and had no personal acquaintance with any of the members thereof; but they knew H. S. by reputation, and that his reputation was good, and they took daily the newspapers in which the notice of dissolution, etc., was published, but never saw or had knowledge thereof. One of the new firm called upon them and purchased goods. He represented himself as one of the firm of H. S. & Co. B. & Co. did not enquire of him who composed the firm, nor did they know; but they enquired on 'change concerning the standing of H. S. & Co., and learned it was good. After the first purchase, H. S. & Co. purchased by orders, written upon paper with letter-heading, printed H. S. & Co. After these purchases, and in ten months after its formation, the new firm of H. S. & Co. failed, with liabilities amounting to some $60,000, and with assets not exeeeding $6000 in value. In an action of B. & Co. against H. S. & Co., including H. S. individually by name, for the price of the goods so sold and delivered to the new firm: *Held*, that the firm name H. S. & Co., was more than a mere designation of a house, or association of persons of any names indifferently, but was a declaration that H. S. personally was a member of the firm, and strangers not knowing the facts were justified in dealing with the firm on the faith of such representation, without inquiring further; that as H. S. voluntarily and actively caused and assented to the use of his name as a partner in that connection, he was, as against B. & Co., estopped from denying that he was a partner in the firm, and that they could sue and recover against him as such, for the goods so sold and delivered by them.

The fact that one of the new firm, in the absence of all the members of the firm of B. & Co., may have handed their porter or other employee a card with the names of the two members printed in the upper left and right corners, and H. S. & Co. in the center, was not notice to B. & Co. of the fact that H. S. was not a partner, such card never having heen handed to B. & Co.

Husband and Wife—Married Woman a Partner.—A married woman has not capacity to enter into a general mercantile partnership not connected with or relating to her separate property, and where she assumes to do so with the consent of her husband, and is by him assisted in managing and carrying on the business, the husband, and not the wife, is to be regarded in law as the partner. Swasey v. Antram, 24 Ohio State, 87.

———. ———. The *feme covert* having obtained a "permit" to trade within the lines of the army, with the knowledge and consent of her husband, entered into a partnership with other persons, for the purpose of buying and selling goods and merchandise under said "permit," and herself, with the assistance of her husband, managed and conducted the business. The firm was subsequently dissolved, and its property transferred by the other partners to her, she agreeing to pay all the partnership debts. She then sold the property to S., who had notice of all the facts, and who in like manner agreed to pay the partnership debts. This was all done with the knowledge and concurrence of the husband, who joined her in executing the bill of sale to S. In an action by a creditor of the firm against the *husband* and the other members of the firm, not including the wife: *Held*, that the goods in the hands of S., or the price agreed by him to be paid therefor, and not yet paid, are liable to atatchment in the action. Ibid.

Bank Deposits—Right of Arrest.—Where money is deposited from time to time in the course of ordinary banking business, subject to check at sight, the relation between the parties is that of debtor and creditor, and not that of trustee and *cestui que* trust. In such case the credit is given to the pecuniary responsibility of the banker, and not to his personal integrity, and the deposit becomes the propertyof the recipient, to be paid on demand as a debt due and payable. Therefore, in an action to recover the money so deposited, no right of arrest exists under the New York Code. Buchanan Farm Oil Co. v. Woodman, June court.—[*Daily Register, Aug. 15.*

Bankruptcy—Railroad Corporation—Act of Bankruptcy—Mortgage.—It is not an act of bankruptcy for a railroad corporation to convey its property in trust to secure bonds to be issued and sold, and the proceeds to be applied to pay all its unsecured debts, the same being done *bona fide* with a view to enable the company to continue its legitimate business, though it may be technically insolvent, or likely soon to be so. In *re* Union Pacific Railroad Company, U. S. District Court, District of Massachusetts, (LOWELL, J.) 31 Legal Intelligencer, 261.

Same.—Such a mortgage is not made invalid by the circumstance that the unsecured creditors are offered the right to take the new bonds, or the proceeds of sale thereof, at their election. Ibid.

Same.—*It seems* that a mortgage for money to pay debts ratably would not be an act of bankruptcy even in a trader. Ibid.

Same.—Some distinctions between traders and railroad corporations, in respect to mortgaging their property, pointed out. Ibid.

Property in Membership of Board of Stock Brokers—Assets.—Where, under the articles of association of a board of stock brokers, a member cannot transfer his seat to a party not elected and approved by the board; and where upon the insolvency of a member, his rights as such are forfeited, and the board is authorized to dispose of his seat, and apply the proceeds to the payment of his indebtedness to other members of the board to the exclusion of all others, only the residue of the proceeds of the sale, after paying all the liabilities provided for in said articles of association, is assets of such insolvent member. Hyde v. Woods, U. S. Circuit Court, District of California, SAWYER, J., 1 Am. Law Times Reports, N. S. 354.

Same—Case in Judgment.—Under such articles, F., a member, failed to meet his engagements in the board, August 24, 1872, and being indebted in a large amount to sundry members, on that day assigned his seat in the board to W., with authority to sell and pay the proceeds to his various creditors in the board. With the assent of the board, W. sold the seat to T., who was elected by the board, for ten thousand dollars, and, with the approval of the board, paid the entire proceeds pro-ratably to F.'s creditors, who were co-members. October 1st, 1872, F. was adjudged a bankrupt on petition of a general creditor, filed September 18th, 1872. After said sale and payment, an assignee having been appointed, he brought suit against W. to recover said sum of ten thousand dollars. *Held*, That the assignee was only entitled to the residue after payment of F.'s liabilities to the co-members provided for in the articles of association, and there being no surplus, he was not entitled to recover. Ibid.

Principles which Govern in Interpreting Wills.—If wills are to be interpreted in the light of precedents, the court will follow those which are most in harmony with the genius and laws of this country, and customs of its people. It will be guided by those that effectually do justice, and not by such as would give an arbitrary and technical meaning to words never understood or contemplated by the testator, and that may defeat all the objects of his beneficence, as manifested in his will. Ibid.

Priority of Attachment over Deed of Assignment.—In Wilson v. Eiffler, Supreme Court of Tennessee, Knoxville, 1872 (Nashville Commercial Reporter, for Aug. 10), the point is ruled that a deed received in a register's office, and the time of its reception endorsed on it by a party not authorized by law to make the endorsement, will not hold the property as against creditors attaching the property before the deed was registered.

Section 454 of code of Tennessee requires the register of deeds to keep a book in which he shall note the day and the hour at which instruments are left with him for registration, and the entering of an instrument which is left to be registered in this note book, has the same effect as though the instrument had been actually registered at the time.

It appeared that the assignment in question was left with M. L. Hall, on the day the attachment was levied; that Hall was clerk of the Circuit and District Courts of the United States, and kept his office in the rear of the court-house, and that H. M. Aiken, the deputy register of Knox county, kept the register's books in his (Hall's) office, Hall says, on the 18th of August, 1866, Aiken was absent, and the deed of assignment was brought into his (Hall's) office, and he made the following endorsement on said deed: "Rec'd, Aug. 18, 1866, 10 o'clock A. M." Hall states that he was neither register nor deputy register at the time, but made the memorandum to enable Mr. Aiken to know the time the deed was brought to the office for registration; that he made no entry in the note-book in the register's office. Aiken, the deputy register, shows that the deed was not, in fact, registered for several days after it was left at the office, and was not entered on the note-book until after the levy of the attach-

ment, although the counsel of complainants had notice of its execution before the levy of the attachment. It was *held* that the deed was not noted for registration within the requirements of the statute, and that the rights of attaching creditors were not affected by the endorsement made on the deed.

Marine Insurance—Creditor—Evidence—Declarations—Insolvency.—A shipmaster and owner procured a marine insurance policy upon his one-quarter of his vessel "on account of whom it may concern;" los payable to himself. The vessel was lost during the voyage, covered by the policy, with the master and all on board. The plaintiff, a creditor of the deceased master, brought this action upon the policy, claiming that it was obtained for his benefit. He introduced testimony of the declarations of the deceased that if the plaintiff would make him a loan he would secure him a policy on this vessel; and subsequent declarations that the loan had been made to him by the plaintiff, and that he had secured the plaintiff by procuring a policy for his benefit. *Held*, that the testimony was inadmissible without proof that the deceased was acting as plaintiff's agent in effecting the insurance, and that the declarations themselves were not competent for this purpose. Evidence was introduced to prove the insolvency of the deceased. *Held*, that it was improperly admitted. Sleeper v. Union Ins. Co., Supreme Judicial Court of Maine; Western Ins. Review, July, 1874.

Removal of Causes from State Court to Federal Court—"Final Hearing or Trial."—In Burts v. Beard, Nashville Commercial Reporter, August 20, the Supreme Court of Tennessee had occasion to consider the oft-recurring question of the construction of the act of Congress of 1867, with reference to the removal of causes from the state courts to the federal courts. The case was in chancery, and on the coming in of the master's report, a petition was presented asking that the cause be transferred to the federal court. This the chancellor refused, and the supreme court, in passing upon this ruling, say: "We assume that the petition is based on act of Congress of March, 1867. That act provides that in the cases specified, the removal may be had on petition filed at any time before the final hearing or trial of the suit. This act as we think, simply means before a trial or hearing settling the rights of the parties. The object was to give the parties a trial in the federal court, where it was assumed the questions might be more fairly investigated, freed from local prejudices. After the trial it is too late to transfer the cause. This would be to give revisory power to the federal circuit court and not an original trial, as was contemplated by the statute. Such is the ruling of the Supreme Court of Ohio, in a well considered case, 4 Ohio, 642, and which we think clearly correct, and adopt. The chancellor was correct in refusing the transfer as asked."

Liability of Municipal Corporation for Injuries Caused by Failing to Keep Sidewalks Cleared of Snow.—In Grenier v. La Corporation de Montreal, 5 La Revue Legale, 195, a lady sued the city for $500 damages, suffered through the default of the corporation neglecting to keep the pavement of a street in order, whereby she slipped on the ice and fractered her arm. The corporation denied that they were compelled to keep the streets clear of snow, but that, under a by-law, citizens were bound to keep their winter pavements in order, and it was the duty of persons to notify the corporation of any refusal or neglect to obey this by-law. The judge declared that in the climate of Montreal "slippery walking in winter is the nominal condition of things," and decided that the corporation in this case was not at fault.—[*Legal Gazette.*

Liability of the District of Columbia, under its Present Government, for Injuries to persons Falling into Unguarded Excavations in its Streets.—In the opinion of the Supreme Court of the District of Columbia, General Term, delivered by OLIN, J., in the case of Barnes v. The District of Columbia, it is *held*, that the powers and privileges of the Baltimore & Potomac Railroad Company, under the various acts of of Congress authorizing the extension, construction, and use of a lateral branch of said road in the district, were granted free from the interference of the then municipal government of the city of Washington, and were in no way subject to its control; that under the act of Congress, of February 21, 1871, providing a government for the District of Columbia, the "entire control" of the streets and avenues of the city of Washington was given to the board of public works; that no powers were given, and no duty or obligation imposed upon the *government* created by said act, to repair them or keep in order; that said board, although created by the same act, was no constituent part of said government, and that any interference with the streets, etc., on the part of its officers, servants or agents, against the will or consent of said board would have been as much a trespass as an interference with the prescribed duty of any other *agents* of the United States, and that, consequently, where the railroad company, in constructing its road, opened a deep excavation for the track by the side of a traveled street, and so negligently omitted to put up barriers, safeguards and lights, that a citizen, in the exercise of ordinary care and prudence, fell into such excavation and was seriously injured, the district was not liable for the negligence of the railroad corporation created as aforesaid by the act of Congress, nor for the negligence of the board of public works created in the same way.

The learned judge, while admitting the liability, on grounds of public policy, of the tax-paying population of a municipal corporation which elects or appoints its own officers, agents, and servants, for their misfeasance or malfeasance, thinks that, in the present case it would be running the doctrine of "imputed sin" into the ground, to hold that they are responsible where a government is imposing on them in respect to which they have little or no voice at all, and in respect to the streets, etc., absolutely none.

The case is published in the Washington Law Reporter, for August 18, from which we take the foregoing synopsis.

Measure of Damages for Conversion—"Rule of Intermediate Higher Value."—In N. Y. Guaranty and Indemnity Co. v. Flynn, the New York Court of Appeals recently held that in an action to recover possession of personal property, in case a return cannot be had, the prevailing party is entitled to the value of the property at the time of the trial, and not at any intermediate time between the taking and the trial. This decision may be regarded as settling the vexed question in New York, which has been agitated ever since Cortelyou v. Lansing, 2 Caines' Cas. 200, as to what is the true measure of damages in case of a conversion. In Baker v. Drake, 8 A. L. J. 340, the New York Court of Appeals decided that in an action to recover damages for a wrongful conversion of stocks, the measure of damages was not the highest market value which the stocks had reached between the time of the conversion and the trial. The court in that case gave a very elaborate examination of the authorities, and overruled all cases in New York state holding a contrary doctrine; but the decision was a negative one, and did not state what the measure of damages actually was. In New York Guaranty and Indemnity Co. v. Flynn, *supra*, the measure of damages was positively decided. Whether the rule finally adopted by this court is the most reasonable or logical one, may be open to consideration. And it seems to us that a better rule would be the value which the owner of the property converted might have (probably) realized at any time between the conversion and the trial, had no conversion taken place. This, of course, would not necessarily be the highest value, for the owner might not avail himself of the highest price. But the value would be such as the owner might reasonably be expected to have realized had the property remained in his possession at any time before trial. This would be for the jury to determine. There may be some difficulties in the application of this rule, but we think it not impracticable.

There are some recent cases in other states that hold the measure of damages to be the value at the time of conversion, with interest to the time of trial. See Sturges v, Keith, 11 Am. Rep. 28; 57 Ill. 451; Boylan v. Huguet, 8 Nev. 345. For an able and exhaustive discussion of this subject, see Sedgwick on Damages, 6th ed., 590, 609, note, entitled "Rule of intermediate higher value."—[*Albany Law Journal.*

Negligence, when a Question for Jury.—We have heretofore alluded to the difficulties in the way of determining in what cases the question of negligence or no negligence is one to be determined by the court, or to be resolved by the jury (*ante*, p. 374.) In Ohio, the question seems controlled to some extent, by statute; and we note the following interesting ruling upon the subject, by the supreme court of that state, in 24 Ohio State Reports, 83: The case was an action brought by plaintiff in error to recover for injuries alleged to have been caused by the negligence of the defendant, a railroad company, in the management of one of its trains. After the introduction of the plaintiff's evidence, the defendant moved the court to arrest the testimony from the jury and nonsuit the plaintiff. The court, being of the opinion that the testimony adduced was not sufficient in law to sustain the action, granted the motion, as the record states, "upon the merits of said action," and rendered judgment that the defendant go hence without day and recover of the plaintiff its costs.

The court ruled the following propositions:

1. Section 4 of the act of April 12, 1858, to relieve the district courts, etc. (S. & C. 1155), which gives the right to either party to except to the opinion of the court on a motion to direct a nonsuit and to arrest the testimony from the jury, does not, by implication, repeal or modify the provision in section 372 of the code, which declares that, upon the trial of the action, in all cases except such as are therein specified, the decision must be upon the merits.

2. Under the act of April 12, 1858, the court is authorized, in a proper case, to arrest the testimony from the jury, and render judgment for the defendant. The judgment in such case, however, has not the effect of a nonsuit at common law, but is, under the provision of the code above referred to, a decision of the action upon the merits.

3. If the evidence *tends* to prove all the facts which it is incumbent on the plaintiff to establish in order to maintain his action, he has a right to have weight and sufficiency of the evidence passed upon by the jury, and it is error for the court to grant the motion, and render judgment against him.